This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

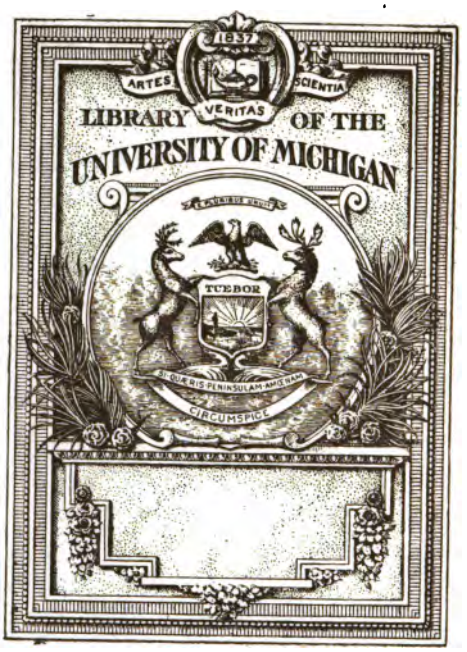
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

B 456223



1837
ARTES VERITAS SCIENTIA
LIBRARY OF THE
UNIVERSITY OF MICHIGAN
E PLURIBUS UNUM
TUEBOR
SI QUÆRIS PENINSULAM AMŒNAM
CIRCUMSPICE

HD
2773
1914

FEB26 1914

TRUST LEGISLATION

HEARINGS

U.S. Congress. House

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 1

DECEMBER 9, 16, AND 19, 1913

JANUARY 29, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

	Page.
Hon. Dick T. Morgan, a Representative from Oklahoma, remarks by.....	3, 35
Mr. Samuel Gompers, president American Federation of Labor, remarks by...	12
Hon. A. O. Stanley, a Representative from Kentucky, remarks by.....	29
Hon. Robert L. Henry, a Representative from Texas, letter from.....	54

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, Chairman.

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
R. Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	L. C. DYER, Missouri.
JOSEPH TAGGART, Kansas	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk*.

TRUST LEGISLATION.

SERIAL 7, PART 1.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, December 9, 1913.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Mr. Morgan, we had promised to give you a hearing on your bill this morning, and you may proceed at this time.

STATEMENT OF HON. DICK T. MORGAN, REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA.

Mr. MORGAN. Mr. Chairman and gentlemen of the committee, in the Sixty-second Congress, January 25, 1912, I introduced H. R. 18711, entitled "A bill to regulate the commerce of certain corporations, and for other purposes." Among other things the bill created an "interstate corporation commission," composed of seven members, and gave to the said commission extensive power of supervision and control over the large industrial corporations doing an interstate business. On the 20th of February, 1912, I delivered in the House of Representatives a speech in which I explained the provisions of my bill and advocated its enactment into law. So far as I know this was the first bill introduced in the House creating such a commission, and so far as I know I was the first to advocate in a formal speech in the House the creation of such a commission. On the 7th day of April, 1913, the first day of the first session of the Sixty-third Congress, I reintroduced this bill. The new bill is H. R. 1890.

On July 2, 1890, the so-called Sherman antitrust law was approved. More than 23 years have come and gone. In the meantime we have not added a single line to our Federal laws which materially increases, extends, or enlarges the actual control of the National Government over the great industrial corporations. In the 23 years that have elapsed since the enactment of the Sherman Antitrust Act our greatest corporations have been formed. Our industrial institutions have largely increased their monopolistic power. In these 23 years no other public question has attracted more attention. It would seem that the time had passed for discussion, agitation, and denunciation, and that Congress should now proceed with constructive legistation.

The Sherman antitrust law as administered by the courts has neither prevented nor suppressed nor controlled private monopoly in this country. In spite of the law, great combinations possessing a large degree of monopolistic power have been formed. They are doing business in the United States to-day. Business has been concentrated and competition is no longer the chief factor in controlling prices of many products in common use.

The failure of the Sherman antitrust law to accomplish what its authors designed it should accomplish, may be attributed to two things: First, to defects in the law itself, and second, to the lack of a proper administrative body to administer and enforce the law. Our duty is plain. We must supplement the law with additional statutory provisions, and we must create some kind of an administrative board or commission to enforce and administer the law.

To my mind the first proposition for this committee to decide is whether or not we shall favor the creation of some kind of a board or commission to aid in the enforcement and administration of existing laws, and laws that may be enacted hereafter. If we decide that an interstate trade or corporation commission shall be created to aid in administering antitrust laws, then we can take up the question of what power and jurisdiction shall be given this commission, and what laws shall be enacted to prevent, suppress and control all monopolistic concerns.

I have reached the conclusion that we will never make any substantial progress in either preventing, suppressing or controlling monopolistic concerns until we shall have organized a Federal commission, with extensive powers, to administer our laws on the subject.

I shall therefore first present some arguments in favor of creating such a commission and, second, will discuss the power that should be given the commission, and the provisions of H. R. 1890.

The great political parties, through declarations made in national platforms are, I think, fairly committed to the commission plan. The Republican and Progressive Parties are committed by specific declarations and the Democratic Party by implication.

The Republican Party in its national platforms has repeatedly declared for additional legislation for the supervision, regulation, and control of the trusts.

In 1912 the Republican national platform declared:

> The Republican Party favors the enactment of legislation supplementary to the existing antitrust act, which will define as criminal offenses those specific acts that uniformly mark attempts to restrain and to monopolize trade, to the end that those who honestly intend to obey the law may have a guide for their action and that those who aim to violate the law may the more surely be punished.

In the enforcement and administration of Federal laws governing interstate commerce, and enterprises impressed with a public use engaged therein, there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the law and avoid delays and technicalities incident to court procedure.

In its first national convention the Progressive Party declared as follows:

We therefore demand a strong national regulation of interstate corporations. * * *
To that end we urge the establishment of a strong Federal administrative commission of high standing which shall maintain permanent active supervision over industrial corporations engaged in interstate commerce or such of them as are of public importance, doing for them what the Government now does for the national banks and what is now done for the railroads by the Interstate Commerce Commission. * * *

The Democratic Party has declared for legislation——

Mr. CARLIN (interposing). Do you mean that that means the fixing of the price of the product in the way in which the Interstate Commerce Commission fixes the rate?

Mr. MORGAN. I was simply reading the declaration of the Progressive platform.

Mr. CARLIN. I thought you were expressing yourself as in favor of the idea.

Mr. MORGAN. I will state that in my bill there is a provision relating to the regulation of the prices, and I will refer to that in the latter part of my argument.

The Democratic Party has declared for legislation that can not be effectively enforced or administered except through some kind of a national administrative board or commission.

I especially call attention to the following declarations:

In the Democratic platform of 1892 it declared as follows:

We demand the rigid enforcement of the laws made to prevent and control them (trusts and combinations), together with such further legislation in restraint of their abuses as experience may show to be necessary.

The Democratic platform of 1896 contained this:

The absorption of wealth by the few, the consolidation of our leading railroad systems, and the formation of trusts and pools require a stricter control by the Federal Government of those arteries of commerce.

In the platform of the Democratic Party of 1900 we find the following:

Existing laws against trusts must be enforced and more stringent ones must be enacted, providing for publicity as to the affairs of corporations engaged in interstate commerce, requiring all corporations to show, before doing business outside the State of their origin, that they have no water in their stock, and that they have not attempted and are not attempting to monopolize any branch business or the production of any article of merchandise; and the whole constitutional power of Congress over interstate commerce, the mails, and all modes of interstate communication shall be exercised by the enactment of comprehensive laws upon the subject of trusts.

The Democratic platform of 1904 has the following:

We demand a strict enforcement of existing civil and criminal statutes against all such trusts, combinations, and monopolies, and we demand the enactment of such further legislation as may be necessary to effectively suppress them.

Any trust or unlawful combination engaged in interstate commerce which is monopolizing any branch of business or production should not be permitted to transact business outside of the State of its origin. Whenever it shall be established in any court of competent jurisdiction that such monopolization exists, such prohibition should be enforced through comprehensive laws to be enacted on the subject.

The Democratic platform of 1908 contains the following:

We therefore favor the vigorous enforcement of the criminal law against guilty trust magnates and officials and demand the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States. Among the additional remedies we specify three: First, a law preventing a duplication of directors among competing corporations; second, a license system which will, without abridging the right of each State to create corporations or its right to regulate as it will foreign corporations doing business within its limits, make it necessary for a manufacturing or trading corporation engaged in interstate commerce to take out a Federal license before it shall be permitted to control as much as 25 per cent of the products in which it deals, the license to protect the public from watered stock and to prohibit the control by such corporation of more than 50 per cent of the total amount of any product consumed in the United States; and, third, a law compelling such licensed corporations to sell to all purchasers in all parts of the country on the same terms, after making the allowance for the cost of transportation.

And the Democratic Party, in its platform of 1912, states:

* * * We favor the declaration by law of the conditions upon which corporations shall be permitted to engage in interstate trade, including, among others, the prevention of holding companies, of interlocking directors, of stock watering, or discrimination in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions. * * *

I submit, Mr. Chairman and gentlemen of the committee, that the Democratic platform declarations call for a program that can not be carried out except through a Federal commission with extensive jurisdiction over our great industrial corporations.

Mr. CARLIN. Was that the Democratic platform which you just read?

Mr. NELSON. That was not the last platform?

Mr. MORGAN. That was 1908. In other words, you can not have a license system, with all these many provisions which have been declared for, unless there is some administrative body to carry it out, and hence I conclude that the Democratic Party is for this and both the Progressive and Republican Parties have specifically declared for a commission.

The plan of creating a national commission has been indorsed by Senators and Representatives in Congress, by prominent Government officials, by prominent editors, by distinguished citizens, scholars, political economists, business men, and especially by men at the head of some of our greatest industrial corporations. Senators Newlands and Bristow have introduced bills in the Senate providing for the creation of such a commission. Representatives Gardner, of Massachusetts, Murdock, of Kansas, Martin, of South Dakota, and myself have introduced bills in the House of Representatives.

I have not made a recent search; there may be others who have introduced similar bills.

The Senate Committee on Interstate Commerce, under Senate resolution 98, Sixty-second Congress, held an exhaustive hearing on the subject of antitrust legislation, and Senator Cummins, for the majority of the committee, made a report in favor of the creation of such a commission. The hearings of this committee have been printed in two large volumes, making a total of 2,779 pages of printed matter. One hundred and three persons were heard by the committee. Among those who appeared before the Senate committee and indorsed the plan of creating a commission to aid in administering antitrust laws, the following may be mentioned: Hon. Seth Low, New York, head of

the Civic Federation; Elbert H. Gary, chairman of board of directors of the United States Steel Corporation; George W. Perkins, New York, of the International Harvester Co. Among prominent lawyers who appeared before the committee and indorsed the commission plan may be mentioned Samuel Untermeyer, Louis D. Brandeis, Victor Morawetz, William B. Hornblower, and Francis L. Stetson. Among educators and political economists who appeared before the committee and indorsed the plan of Federal trade commission may be mentioned the following: Charles R. Van Hese, president of the University of Missouri; John H. Gray, professor of economics, University of Minnesota; John Bates Clark, professor of economics, Columbia University; J. Lawrence Saughten, professor of political economy, Chicago University; Prof. James H. Gore, former professor of mathematics in Columbian University. To these may be added the editor of the Outlook, Lyman Abbott.

One hundred and three persons appeared before the Senate committee at this hearing. Among those who were interrogated as to the advisability of establishing a national commission, a very large majority expressed themselves favorable to the proposition.

Ex-President Theodore Roosevelt has frequently expressed himself in favor of such a commission.

The business interests of the country are favorable to the proposition to create a national trade commission. This is proven by the replies received by the National Civic Federation to inquiries sent out to 1,006 manufacturers, merchants, bankers, and business men throughout the country. Out of 892 answers, 614 declared in favor of the commission, 278 against it. (See note, Senate Hearings, pp. 499, 500.)

The report of the majority of the Senate Committee on Interstate Commerce, Sixty-second Congress, indorsed the plan of creating an interstate trade commission. The committee was composed of the following members: Moses E. Clapp, of Minnesota, chairman; Shelby M. Cullom, of Illinois; W. Murray Crane, of Massachusetts; George S. Nixon, of Nevada; Albert B. Cummins, of Iowa; Frank B. Brandegee, of Connecticut; George T. Oliver, of Pennsylvania; Henry F. Lippitt, of Rhode Island; Charles E. Townsend, of Michigan; Benjamin R. Tillman, of South Carolina; Murphy J. Foster, of Louisiana; Francis G. Newlands, of Nevada; James P. Clarke, of Arkansas; Thomas P. Gore, of Oklahoma; Clarence W. Watson, of West Virginia; and Atlee Pomerene, of Ohio.

Senators Pomerene, Tillman, and Gore filed brief additional views, in which Gore and Tillman declared that at that time they did not desire to commit themselves to the proposition of creating a commission.

The minority of the committee, consisting of Crane, Brandegee, Oliver, and Lippitt, filed a minority report, in which they simply declared they can not agree in the report, with no special reference to the proposed interstate-trade commission.

On the proposition to create a Federal commission the majority report says:

> There are many forms of combination and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful; but as the statute is now construed there are many forms of

organization and many other practices that seriously interfere with competition and are plainly opposed to the public welfare concerning which it is impossible to predict with any certainty whether they will be held to be due or undue restraints of trade.

The committee does not conceal the difficulty of reaching an agreement concerning the details of the legislation just outlined, but it has no hesitation in reporting that legislation of a general character pointed out is both wise and necessary.

The committee further reports that if the additional legislation, the general scope of which has been pointed out, is enacted it will be very desirable to accompany such legislation with a measure establishing a commission for the better administration of the law and to aid in its enforcement. It may be fairly said that there is need of such a commission, even though the present statute is not supplemented in any manner; but it is apparent that if the new legislation is enacted the need of a commission will become more imperative.

A Federal commission is demanded, if for no other purpose than to aid in the dissolution and reorganization of unlawful corporations.

If we do not enact any additional statutes, to supplement the Sherman antitrust law, we should create a commission to aid the courts in administering and enforcing that law. Twenty-three years of comparative failure on the part of the existing executing and judicial machinery to effectively and successfully enforce and administer the laws against unlawful combinations should be sufficient to convince us that some additional administrative machinery is absolutely necessary, because we are bound to assume that the Department of Justice and the courts have made a reasonable effort. We must conclude that there is something wanting in our administrative machinery. It seems, therefore, that the proposal to create a commission is a proposition upon which all might agree. It is a plan that could be consistently supported alike by those who favor amending or supplementing the Sherman Anti-Trust Law and those who are opposed to any amendments or supplemental statutory provisions.

The Senate Committee on Interstate Commerce, Sixty-second Congress, in its report on S. R. 98, found on page 15 Senate hearings, on this point aptly says:

One of the most serious problems in connection with suits brought under the antitrust act is to find the proper method of disintegrating combinations that have been adjudged unlawful. The dissolution of a corporation of a series of associated corporations must often involve the consideration of plans for reorganization in order that the property which has been unlawfully employed may thereafter be lawfully used in commerce. The courts are not fitted for the work of reconstruction, and whatever jurisdiction they now have, or that may hereafter be conferred upon them with respect to such matters, it can not be gainsaid that a commission, the members of which are in close touch with business affairs and who are intimately acquainted with the commercial situation, might be extremely helpful in the required readjustment.

A Federal commission would be desirable to do the work committed now to the Bureau of Corporations, even if no additional duty were conferred upon it and no additional power given it. I say this without intending any reflection whatever upon the valuable work that has been done by the Commissioner of Corporations. Even in the work of investigation, of recommendation, of gathering statistics, of the preparation for reports, of wielding the weapon of publicity, the work of an independent commission of three or five men would carry more weight and inspire more confidence than the work of a single commissioner. It would be a good piece of constructive legislation and mark an advancement in legislation for the proper control of our great industrial corporations if, without any additional

regulative or prohibitory statutory legislation against trusts, we should merge our Bureau of Corporations into a commission and give this commission the additional power to aid the Department of Justice and the courts in the enforcement and administration of the Sherman antitrust law as it now exists.

The Senate committee in its hearings on page 14 supports this view in its report in the following language:

> If the Bureau of Corporations were converted into an independent commission composed of trained, skillful men and clothed with adequate authority, there could be gathered more complete and accurate knowledge of the organization, management, and practices of the corporations and associations engaged in national and international commerce than we now have. In saying this the committee does not need to disparage the work of the Bureau of Corporations as hitherto carried on, but valuable as the work has been it is believed that a greater service could be rendered by a commission with a distinct organization, with adequate appropriations, and adequate authority. Moreover, it is clear that the constant inquiry into and investigation of interstate commerce in order to ascertain whether the law is being violated should be more closely connected with prosecutions for violations when found to exist than at the present time.

If we shall add materially to our statutory laws pertaining to many of the large industrial corporations, a Federal commission becomes imperative and indispensable.

With the present laws not effectively enforced and administered, it would be the height of folly to expect satisfactory results by simply enacting additional laws. A few laws well enforced will bring better results than many laws which remain largely a dead letter on the statute books. Suppose we prohibit interlocking directories and holding companies, or provide a license system for corporations engaged in interstate commerce, or enact a Federal incorporation law, or pass laws regulating and controlling all combinations and trade agreements, where are we to get the executive and administrative machinery to administer and enforce these laws? It is not in existence now. It must be created by congressional enactment. Nothing better has been suggested than a commission to do this work.

An interstate trade commission would be a potent factor to insure that the cost of living should not be excessive.

The country has heard much about the high cost of living. Assuming that the cost of living is excessive, what is the remedy? The producers, the farmers, are not getting exorbitant prices. The difficulty is between the farmer and the consumer. Large corporations to a great extent have control of the transportaion, manufacture, sale, and distribution of our important food products. Many of these corporations possess large monopolistic power. Many of these corporations may not be unlawful under the Sherman Antitrust Act, and may not be doing business contrary to its provisions. At the same time their prices may be largely arbitrary—not controlled by any effective competition. If these corporations were placed under a commission with ample power of supervision and control, the consumer would be protected from excessive prices. Because a commission, even without power to fix prices, would be a most potent factor in restoring and maintaining competition as a factor in controlling the prices of all food products, merchandise, and manufactured articles.

The Interstate Commerce Commission is a model for our guidance. The success which has attended the work of this great commission

abundantly justifies the Nation in creating a similar commission to supervise, regulate, and control the gigantic industrial corporations of our country.

Twenty-six years ago a great controversy was in progress in this country. The parties engaged in the contest were the people and the railroads. The time had come when it must be decided who was supreme, the people or the railroads. Congress, reflecting the sentiment of the people, created the Interstate Commerce Commission. In the act creating the commission Congress also promulgated three fundamental rules of conduct which the railroads were required to obey. These cardinal rules required of the railroads, first, that they should give to the public reasonable and just rates; second, that they should give to individuals and localities equality of rates; and, third they should give to all impartial privileges and facilities.

Before its enactment the great transportation companies of this country had it in their power to levy annually upon the people of the United States millions of dollars of unjust tribute. They could with perfect impunity give special rates, rebates, drawbacks, and other preferences which would enrich one man and impoverish another. There was not a syllable of law that regulated the rates or controlled the practices or restrained the acts of our great railways in their interstate business. The railway managers were absolute in their power, supreme in their authority.

All this has been changed. The people are now supreme. They are freed from railway domination. They are masters of the railways, not their subjects.

The people of the United States are now in a second great struggle. Their antagonist at this time is our great industrial corporations. These gigantic organizations are strongly intrenched. They have untold wealth. They have unlimited resources. They have able leadership. They have the confidence which comes from many victories already won. They are equipped in every way to make a long, stubborn, and effective fight. The interests of 90,000,000 people are at stake. In this great crisis the country turns to the National Legislative Assembly. Let us not disappoint the people in their expectations. Let us give them the same instrument of warfare, the same weapon in battle, the same fighting machine that they used so successfully and effectively in their contest with the great railway corporations. Let us create a great interstate corporation commission, clothe it with ample power and jurisdiction, and direct it to proceed forthwith to bring our gigantic industrial corporations into subjection. To guide these great business institutions in conducting their business let us proclaim by legislative enactment that their prices must be reasonable and just, that all must be given like privileges and advantages, and that the National Government will not tolerate practices or methods in business that are unfair, unjust, or unreasonable, or that are against public policy or dangerous to the public welfare.

Many of our industrial corporations are in fact, though not in the eye of the law, public agencies, institutions that are impressed with a public use, and are in truth and in reality quasi-public corporations. Whatever law we may enact, it should contain a clause declaring that industrial corporations, of a certain size or character, are quasi-public corporations, and shall hereafter be regarded in the same class with

our railways, telegraph and telephone and all public service and public utility corporations. We must in some way make a distinction between the gigantic corporations possessing large monopolistic power, and controlling the manufacture, sale, and distribution of the necessities of life, and the great majority of the smaller corporations which possess little, if any, monopolistic power, and which are in no way in a position to impose any great burdens upon the people through excessive prices. Out of nearly 300,000 industrial corporations in the United States perhaps 300 to 500 would cover all the industrial corporations which really possess such monopolistic power as to be able to injure any great part of the public through the possession of monopolistic powers. Let us separate the sheep from the goats. Let free competition, untrammeled by governmental control, reign among our lamblike industrial corporations, but let us bring all other corporations under the yoke of governmental control.

The great corporations largely control the productive forces of our country. The wealth produced naturally flows into the corporations. Measured by the stocks and bonds they have issued, our corporations own $92,000,000,000 of our national wealth. This is more than double the $41,000,000,000 at which all our farms and farm property is doubled. Seventy-two billion dollars of wealth is owned by two classes of our corporations; that is, transportation and communication corporations and manufacturing corporations.

The census of 1910 shows that one-third of our manufacturing establishments employ 90 per cent of the 7,000,000 wage earners in these establishments and produce 95 per cent of all our manufactured products. In round numbers, 10 per cent of our manufacturing establishments employ three-fourths of the labor in such establishments and produce four-fifths of the product.

One per cent of our manufacturing establishments employ one-third of the labor, and produce nearly one-half of our manufactured products.

I do not believe in Government control of private business. I do not believe that would ever be necessary. All progress would cease if we should destroy the incentive for individual initiation, for individual effort and energy. But corporations are artificial persons. When they attain a certain size, and acquire large control over the production of a product in common use, they cease to be strictly private concerns. They have become impressed with the public use, they have become public agencies and quasi-public corporations, and as such should be placed under the supervision and control of our Federal Government.

Mr. McCoy. What is the salary of the members of the Interstate Commission?

Mr. Morgan. $10,000, I think.

Mr. McCoy. I notice that your bill fixes the salary of the proposed commission at $7,500.

Mr. Morgan. If the committee wishes to proceed further at this time, I will take up and explain the detailed provisions of my bill.

Mr. Floyd. I wish to say, Mr. Morgan, that I have—and I think the other members of the committee have, too—listened with great interest and much pleasure to your arguments, but the House is in session at this time, and the members of the committee desire to be

on the floor of the House, and I suggest that you proceed with the discussion of the detailed discussion of the provisions of the bill at the next meeting of the committee next Thursday morning.

Mr. MORGAN. If that is satisfactory to the committee, I am willing to do so.

(Thereupon at 12.35 o'clock p. m. the committee adjourned until Thursday, December 11, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., Tuesday, December 16, 1913.

The committee met at 11 o'clock a. m., Hon Henry D. Clayton (chairman) presiding.

Present: Representatives Carlin, Floyd, Dupré, McGillicuddy, Mitchell, Nelson, Danforth, Morgan, Volstead, Peterson, FitzHenry, McCoy, and Thomas.

STATEMENT OF MR. SAMUEL GOMPERS, PRESIDENT AMERICAN FEDERATION OF LABOR.

The CHAIRMAN. A few days ago a request was made that the committee hear Mr. Gompers and some of his associates this morning, and I see they are here present. I do not know how much time they will want. We are a very busy committee, but there is no disposition on the part of the committee to be unreasonable about the matter or the length of the time occupied. With that announcement, we will hear from Mr. Gompers and his associates now.

Mr. GOMPERS. Mr. Chairman and gentlemen of the Judiciary Committee, let me say in the beginning that it is not our desire that there should be hearings, and that which we have to present we shall want to do so very briefly and occupy but a very small portion of your time. It is not with the intention of submitting an argument that I asked my associates to request an opportunity of making a statement. In my judgment everything that can be said upon this subject has already been said.

The CHAIRMAN. Upon what subject, Mr. Gompers? You have not indicated up to this time upon what subject or to what bill you are speaking.

Mr. GOMPERS. I am speaking to a part of the bill known as the Bartlett-Bacon bill, H. R. 1873, Sixty-third Congress, first session, introduced by Mr. Bartlett April 7, 1913, and referred to this committee and ordered printed.

I will say that all that can be said either in favor of the bill or all that can be urged against it is in print and in the hearings before the Judiciary Committee of this House of the last Congress or of some previous Congresses; also in print are the hearings of the Senate Judiciary subcommittee. My intention this morning is simply to say that the bill H. R. 1873 by Representative Bartlett is, in the judgment of the men and women of labor who are primarily affected by court decisions and court interpretations of the Sherman antitrust law, the best bill thus far drafted covering the subject.

We have endeavored to secure legislation at the hands of Congress for lo these many years respecting the subject of the position of these voluntary associations of working people, the associations organized not for profit, and to have voluntary associations placed on an equality before the law with other voluntary associations in the United States—the position these associations occupied prior to the interpretations placed upon the Sherman antitrust law by the Federal courts, which interpretation placed the voluntary organizations of working people within the pale of the Sherman antitrust law.

We have suggested to Members of Congress; we have framed our suggestions in the form of amendments from time to time, amendments to the existing law; we have had bills drafted and introduced into both Houses of Congress; we have had, or rather the committees of both Houses have had extensive hearings, and out of one form and another of the arguments and conferences compromises have been reached, particularly in regard to one form of the judicial procedure affecting the issuance of injunctions and interlocutory decrees, which finally developed into what was termed the Wilson Bill; that is, the bill introduced by Mr. William B. Wilson, of Pennsylvania, in the Sixty-first and Sixty-second Congresses. To insist upon our full demand was deemed inadvisable and impracticable at that time by a number of Congressmen, whom we felt were frankly inclined toward the legislation we sought; and, as I say, compromises were effected which in any event left the question of the position of the labor associations, the labor organizations, entirely out of consideration.

Like all other groups of men or individuals, citizens, we are human. We have our faith and we have our principles, or at any rate that which we believe to be principles, and we endeavor, in so far as they affect us politically, to seek political relief from injustice at the hands of Congress. In pursuance of that purpose we have opposed certain Members of Congress; that is, the men whom we knew were opposed to the legislation we sought and believed essential to our very existence as organized bodies of citizens engaged in laudable work. We announced to all whom it might concern that we should oppose and we have opposed certain gentlemen for reelection to Congress because we differed from them and they differed from us; whether they were right or we were right is not the question, but we believed they were wrong, and, as a matter of political duty as well as duty to ourselves, we sought their retirement as Representatives or Senators.

We have also undertaken to advocate the election of men whom we believed to be more sympathetically inclined, and more regardful of the rights or to the justice which we, as organized workers were entitled. We have gone into many of the districts and States to be helpful in them in order that the legislation might be passed which, we are firmly convinced, is necessary to our existence as associated working people. And we have gone further. We have gone to the various national conventions of the great political parties in our country, and we have endeavored to persuade these conventions to declare in favor of the legislation which we were seeking. While I am sure it is not new to you gentlemen, yet I think it necessary that I should read the declarations of the political parties bearing upon the legislation under consideration before your committee this morning, which we believe is best expressed in H. R. 1873. If I should read a few lines more then is contained in the declarations specifically bearing upon the

subject, I trust that I may be pardoned because there are some of the lines in the general declaration which seem to have little connection with the specific subject, and yet probably in the next line or two the matter is again referred to. Let me say in explanation, that we appeared upon this subject the first time before a national convention of a political party at Chicago in 1908, before the Republican National Party convention before the committee on platform, and submitted our requests for declarations to be incorporated in the platform. That party convention gave no heed to the subject; on the contrary, what the convention declared was practically a reaffirmation of the wrongs and the injustice against which we were protesting, so that we had nothing, no comfort, no sympathy, no promise of any sort from that convention. From there we went to the Democratic National convention at Denver, and the party there made a declaration. Because that declaration is reaffirmed in the party platform of the Democratic National convention of 1912, it will not be necessary to read the declaration of 1908. The declaration of the Republican Party convention of 1912 was practically nil upon the subject.

Mr. CARLIN. When you say the Republican Party, whom do you mean?

Mr. GOMPERS. The regular Republican Party.

Mr. CARLIN. Then by that do you mean to distinguish the others as irregular?

Mr. GOMPERS. Hardly. Why not take a man at his own wording? They call themselves Progressives.

Mr. CARLIN. You were not referring to them just a moment ago?

Mr. GOMPERS. I have not yet, not up to this moment, but I intend to. The Democratic Party's platform of 1912 contained these declarations:

> We point to the record of accomplishments of the Democratic House of Representatives in the Sixty-second Congress. We indorse its actions and we challenge comparison of its record with that of any Congress which has been controlled by our opponents. It has passed a bill to prevent the abuse of the right of injunction. It has passed a law establishing an 8-hour day for workingmen employed in all national public work. We repeat our declarations of the platform of 1908 as follows: "The courts of justice are the bulwark of our liberties and we yield to no one in our purpose to maintain their dignity. Our party has given to the bench a long line of distinguished jurists who have aided in the respect and confidence in which this department must be jealously maintained. We resent the attempt of the Republican Party to raise a fancied issue respecting the judiciary. It is an unjust reflection upon a great body of our citizens to assume that they lack respect for the courts. It is the common function of the courts to determine the laws which the people enact, and if the laws appear to work economic, social, or political injustice, it is our duty to change them. The only basis upon which the integrity of our courts may stand is that of unswerving justice and protection of life, personal liberty, and property, and as judicial processes may be abused we should guard them against abuses. Experience has proved the necessity of a modification of the law relating to injunctions, and we reiterate the pledges of our platforms of 1900 and 1904 in favor of a measure which passed the United States Senate in 1896 relating to contempt in Federal courts and providing for trial by jury in cases of indirect contempt. Questions of judicial practice have arisen, especially in connection with industrial disputes. We believe that the parties to all judicial proceedings should be treated or judged impartially and that injunctions should not be issued in any cases in which an injunction would not issue if no industrial disputes were involved. The expanding organization of industry makes it essential that there should be no abridgement of the right of the wage earners and producers to organize for the protection of wages and the adjustment of labor conditions, to the end that such labor organizations and their members should not be regarded as illegal combinations in restraint of trade."

There are a number of other declarations of the party convention affecting the interests of the working people, but that which I have just concluded reading contains the declarations of the national convention of the Democratic Party upon the subject affecting the legislation sought by us, as I say, in Mr. Bartlett's bill, H. R. 1873.

I want to read, because of the interest, as well as the declaration, a part of the platform of the Progressive Party of 1912, upon this same subject. It says:

We believe that the issuance of injunctions in cases arising out of labor disputes should be prohibited when such injunctions would not apply when no labor dispute existed. We believe that a person cited for contempt in labor disputes, except when such contempt was committed in the actual presence of the court, or so nearly thereto as to interfere with the proper administration of justice, should have a right to trial by jury.

The declaration of the Progressive Party upon the subject of the right of association as differentiated from the corporations, trusts, and combinations affected by the antitrust law of 1890:

We favor the organization of the workers, men and women, as a means of protecting their interests and of promoting their progress.

From a careful perusal of these declarations it will be observed that the national convention of the Republican Party totally ignored the questions affecting labor's demands for the principles of justice and human liberty. The declarations of the Democratic Party upon these questions is a reaffirmation of its favorable platform planks of 1908, while that of the Progressive Party is equally outspoken and favorable.

What I wish to convey by the submission of the declarations of both the Democratic and of the Progressive Parties is that if ever an election in any country turned upon an issue upon which the people have decided, it was in regard to the faithfulness with which great political parties shall adhere to their declarations and party platforms. The Democratic Party, although not receiving a majority of all the votes in the popular vote for the presidency, yet received the large number of votes which resulted in electing as the President of the United States the gentleman whom the Democratic Party nominated. In addition, the Progressive Party candidates received nigh upon 3,000,000 votes, and adding the vote of the Progressive Party to that of the Democratic Party, the two parties which declared for this legislation cast nearly, I should say, if not more than two-thirds of the votes cast by the people in that election.

Mr. CARLIN. Which party did the labor people support?

Mr. GOMPERS. The labor interests opposed particularly the reelection of Mr. Taft, and in order to accomplish that as best we could, we aided in every way in our power the election of Mr. Wilson.

I say that when the elections were held and later Mr. Wilson was inaugurated as President, he called a special session of Congress to deal with two great questions, in which the party had been interested and pledged. Now, since April, I think it was, when the special session began, though we are vitally interested, yet because the party management, or congressional managers, believed that they ought not to have their attention diverted from these two specific measures, the tariff and the currency, we have been patient and have permitted Congress, without objection or any agitation, to proceed with that legislation at the special session.

We were given to understand that when the decks of Congress were cleared of these two questions in the special session, which at that time we all believed would probably have been ended in probably a month or two, or three—that at any rate at the regular session Congress would take up seriously and with the very best of intentions and purposes this legislation.

As a result of our work in this line of agitation and opposition on the one hand to the election of the candidates of the Republican Party, and cooperation or support to the successful candidate for the presidency, we reported the result of that work to the convention of the American Federation of Labor, held at Rochester in December, 1912. The convention, without a dissenting voice, and after mature deliberation, approved and indorsed every action and every utterance of those who were intrusted with the work of pressing home upon the people and upon the representatives of the people the legislation we desired as really one of the great conditions upon which our organized lives depended. Indeed, they could do little else at that Rochester convention, for the delegates were in large measure the representative men who carried out that line of work in their respective cities, districts, and States.

Then again, in the last convention of the American Federation of Labor held at Seattle, Wash., which closed only about two weeks ago, the entire subject was again reviewed, and the status of this legislation in Congress reported to the Seattle convention. After the subject-matter had been reviewed by a committee, and considered by that committee with great deliberation, it reported to the convention that every effort of the organized labor movements of America should be concentrated upon the effort to induce Congress to enact the Bartlett-Bacon bill.

Gentlemen, I am not a pessimist. By temperament, or by training, or perhaps a little combination of both, I am inclined to look always upon the brightest side of things. But because I do so is no reason that I must be unconscious of the conditions by which we are surrounded, or that I should fail to understand something of cause and effect. Gentlemen, to-day, as has been the fact for more than five years, the organizations of working people exist at the whim, the fancy, or the mercy of any administration.

Under the interpretation placed upon the Sherman antitrust law by the courts, it is within the province and within the power of any administration at any time to begin proceedings to dissolve any organization of labor in the United States and to take charge of and receive whatever funds any worker or organization may have wanted to contribute or felt that it is his duty to contribute to the organization.

Mr. WEBB. Are there any suits pending in the courts now looking to this end, Mr. Gompers?

Mr. GOMPERS. There are no suits now pending, but an organization of working men, the window-glass workers, was dissolved by order of the court under the provisions of the Sherman antitrust law, charged with conspiracy as an illegal combination in restraint of trade. And while that organization was dissolved by action of the court, yet it created no furore, for this reason: I have no desire to reflect upon the men who are in charge of that organization as its officers and representatives, but it was, in my judgment, supine

cowardness for them not to resist an attempt of the dissolution of their associated effort as a voluntary organization of men to protect the only thing they possessed—the power to labor.

Mr. CARLIN. Where was that suit brought, Mr. Gompers?

Mr. GOMPERS. I can not tell you just now.

Mr. NELSON. May I ask whether there were other matters in the case, or were they dissolved purely as an organized labor organization?

Mr. GOMPERS. As an organization, their agreements with employers were cited as part of the conspiracy in restraint of trade, just as the Supreme Court held in the case of Loewe *v.* Lawler, commonly known as the hatters' case, the court cited the fact that out of the 83 manufacturers—hat manufacturers in the United States—the organization, the union of hatters, had unionized, as the court seemed pleased to call it, 73 of their establishments.

While my verbal memory may not be absolutely accurate, in so far as concerns the intent and purpose of the language, the language of the United States Supreme Court in that case, said:

> So far had conspiracy proceeded that out of 83 hat manufacturers 73 of them were unionized by this association, called the United Hatters of North America.

And mark you this fact. We know what the unstandardized law of wages means; we know what effect an agreement has upon wages; we know that unless there is some established scale of wages, established by some authority, by some power, some force, some group—that unless a scale of wages and condition of employment is established calling for a minimum wage, employers who are willing to pay a higher wage will be compelled to meet the competition of the employer who pays unfairly low wages, so that the only way by which the hatters in that case and workmen generally in other cases can maintain and support the employer who is willing to pay a fair wage and grant fair conditions, is to use the power of associated effort to influence the employer who is unwilling to pay a higher wage. In other words, the more generally that scale could be introduced the more secure was the fair employer, and the more secure was the better paid workman in the receipt of a fair wage and fair conditions. Yet, because the union did that thing, made agreement with employers, the fact that they had succeeded in establishing a minimum scale of wages, minimum hours of labor and other conditions of employment, and secured more generally fair standards prevailing in the trade for the protection of the fair manufacturers, as well as the better paid workers—these facts were cited and held by the court as proving that the conspiracy had progressed to the extent to which I have already mentioned of which the court made mention.

Mr. WEBB. That was a combination between the labor organiza- and the manufacturers, was it not?

Mr. GOMPERS. These 73?

Mr. WEBB. Yes.

Mr. GOMPERS. Yes, sir; the agreements were agreements made year after year with these manufacturers. It was really what has become to be known as collective bargaining.

Mr. WEBB. Have you any case where a labor organization has been dissolved simply because they themselves united in asking or fixing a certain wage and went no further in uniting with the manufacturers?

Mr. GOMPERS. I can not tell you, sir, about that. But that is the very essence of the life of the organization. What I want to convey is this, that there are probably, of these 30,000 or more local associations of working men, what we call local unions of working men and working women, probably more than two-thirds of whom have agreements with employers. As a matter of fact, I think that every observer and every humanitarian who knows greeted with the greatest satisfaction the creation of the protocol in the sweated industries of New York City and vicinity which abolished sweatshops and long hours of labor, and the burdensome, miserable toil prevailing, and established the combination of employers and of work men and work women by which certain standards are to be enforced, and no employer can become a member of the manufacturers' association in that trade unless he is willing to undersign an agreement by which the conditions prevailing in the protocol will be inaugurated by him. Yet, under the provisions of the Sherman antitrust law that association of manufacturers has been sued, I think, for something like $250,000, because it is a conspiracy in restraint of trade.

What I mean to say is this: I am perfectly satisfied in my own mind that the Attorney General of this administration, the Attorney General of the United States under the present administration, is not going to dissolve or make any attempt to dissolve the organizations of the working people of this country. I firmly believe that if there should be any of them, any individual or an aggregation of individuals, guilty of any crime, that the present administration would proceed against them just as readily, and perhaps more so, as any other; I am speaking of the procedure against the organizations themselves and the dissolution of them. But who can tell whether this administration is going to continue very long, or whether the same policy is going to be pursued; that is, the policy of permitting these associations to exist without interference or attempts to isolate them? Who can tell? What may come; what may not the future hold in store for us working people who are engaged in an effort for the protection of men and women who toil to make life better worth living? We do not want to exist as a matter of sufferance, subject to the whims or to the chances or to the vindictiveness of any administration or of an administration officer. Our existence is justified not only by our history, but our existence is legally the best concept of what constitutes law. It is an outrage; it is an outrage of not only the conscience; it is not only an outrage upon justice; it is an outrage upon our language to attempt to place in the same category a combination of men engaged in the speculation and the control of the products of labor and the products of the soil on the one hand and the associations of men and women who own nothing but themselves and undertake to control nothing but themselves and their power to work.

Mr. MCCOY. This bill refers also to associations of agriculturists and would permit them to combine to enhance prices. I never understood why they were coupled in a bill with voluntary associations. What is the theory of that?

Mr. GOMPERS. Let me cross my fingers, so I will not forget what I have to say. In 1890, I think, or in 1889, when the bill in various forms was before Congress—the bill now known as the Sherman antitrust law—I was on earth, and so were a number of men who were

engaged in agricultural pursuits and men who spoke for them. We often had conferences and talks, and we mistrusted some of the gentlemen who had declared that they were with us, and we wanted to have the distinct exclusion from the operation of that law of the organizations of working people and the organizations or the associated efforts of agriculturists and horticulturists, who held simply the products of their own labor, not those who were dealing with the agricultural or horticultural products, the result of the labor of others. I might be interesting to say that such an amendment was adopted by the Senate in the bill then before that body, in Committee of the Whole, and after general congratulations that that result had been attained, that every objection had been overcome, and that the bill could now come before the Senate, everybody was satisfied that the real thing that was sought would be accomplished; that is, the control of what the world, by common consent and understanding, regards as a combination illegal in character and really in restraint of trade. Now, that bill was recommitted to the Judiciary Committee of the Senate, and when it was again reported to the Senate that provision was omitted. We say that we have been in cooperation with the associated farmers of the country; the Farmers' National Union, the Society of Equity, and others have all been with us and we with them. We should like to see the Bartlett-Bacon bill enacted.

Let me call your attention, gentlemen, for a moment to this. Under the provisions of the Sherman antitrust law, as it is now interpreted, the hatters were mulcted in the sum of $224,000 by Mr. Loewe, a manufacturer, who claimed that his firm was damaged in the sum of about $80,000 by reason of a strike and because in California, in San Francisco, another voluntary association of workmen declared that they would not purchase Loewe's hats from a certain dealer; would not give him their patronage if he, this storekeeper, continued to sell Loewe hats. These threefold damages were awarded, and the case is again to come up before the United States Circuit Court of Appeals, probably within a few weeks or months, on final appeal. That is the present status of the case. The $224,000 awarded is threefold damages, and the costs of the court, amounting in all to about a quarter million of dollars. This is the third suit, the third time it comes up before the Federal courts, and you can imagine what that means to us as working people. In so far as the suit is concerned, as it is introduced in the court, it is proved on the official records of the courts and the hearings before Congress that the whole scheme was devised by that organization which has so recently been thoroughly discredited, the so-called Anti-Boycott Association, an auxiliary to the National Association of Manufacturers; they have borne the high cost of it; not one dollar of it was paid by Mr. Loewe, except as he may have been assessed in that Anti-Boycott Association and in the National Association of Manufacturers.

Out of the strike of the shirt-waist girls in Philadelphia, where an effort was made to abolish the awful conditions in that industry, some splendid women who were not working women helped to encourage these girls in their fight that they were making, and they were sued by one of the shirt-waist manufacturers for a sum of over $50,000, claiming threefold damages under the law. Under the provisions of the law Mr. C. W. Post, the gentleman who makes out of his peculiar

ingredients what he calls a breakfast food and the dope which he calls coffee, brought suit for $250,000 against the American Federation of Labor and against the Buck's Stove & Range Co. jointly, because as a minority stockholder of that company Mr. Post declared that that company should have sued us for the amount they lost during the dispute between the company and the men of our movement, and that he was therefore deprived of this monetary advantage. Accordingly, he sued the company and us jointly for $250,000 and demanded the threefold damages; in all, $750,000.

Mr. FLOYD. Where is that suit pending?

Mr. GOMPERS. That suit is not now pending. It was in the Federal courts of St. Louis. I will say, so far as that suit is concerned, we think it is now entirely removed from any further progress; but the fact is that the suit was brought and had to be defended and fought up to the Federal court of appeals.

Any man, any employer, any business man who can show to the satisfaction of a jury that he has been injured in his business by the action of working people, can claim threefold damages, and, as in the case in point, in the hatters' case, men have been ruined, men who never have had much, but had a little equity in homes and a little money in their savings banks, but have lost all in defending these suits. In addition, are the criminal provisions of the Sherman antitrust law, which I believe are set out in sections 1, 3, and 7 of the criminal provisions—I think it is section 7—by which anyone adjudged guilty can be sentenced to a fine of $5,000 and one year's imprisonment, simply because of his activities, such as nothing more than agreeing that he will not work, if you please. In New Orleans only a few years ago, men were indicted, working men were indicted, for no other reason than that, without violence, without any destruction of property, they supported a number of workmen who refused to work below the standard scale of wages provided for that kind of work. The men were indicted because they did that. That was a conspiracy in illegal restraint of trade under the provisions of the Sherman antitrust law. I have been met with the statement "Well, these men were not prosecuted." That is true, but they were indicted, and when men are indicted their liberty is impaired.

In Jacksonville, not more than a year and a half ago, a number of men were indicted under the provisions of the Sherman antitrust law for the very selfsame condition of affairs.

In Kentucky, only about two years ago, a number of farmers were not only indicted and tried, but convicted and sentenced to various terms of imprisonment because of alleged violation of the Sherman antitrust law in that they had agreed not to sell the product of their own labor under a certain price.

Mr. MCCOY. Was it strictly their own labor, or was it the labor of themselves and such men as they hired?

Mr. GOMPERS. I understand it was the product of their own labor, and in any event now, supposing, for the sake of the argument in the case of these men it was not entirely the product of their own labor, but the provisions of the Bartlett-Bacon bill, to which I have referred, provide purely as the product of their own labor.

Mr. DUPRÉ. It will not exempt from punishment Mr. Hahn and Mr. Brown, who were sentenced a few days ago as cotton poolers.

They were sentenced to a fine of $4,000 for a combination of cotton; they did not produce it.

Mr. GOMPERS. You have me up in the air.

Mr. DUPRÉ. I will waive the question.

Mr. GOMPERS. I do not know anything about it. I have been on the go so much; I have been out of Washington now for nearly seven weeks, and many of the things which have occurred in the meantime have escaped me, and that I suppose is one of them.

Here is a case: You know the awful struggle of some years ago through which the miners of the country passed—that is, from 1887 until 1901 and 1902—a period of about 14 or 15 years, I should have said. For 30 years, within my own recollection and observation, the men in the mining industry were the most impoverished of any in all the country. Their wages were reduced in season and out of season. They became demoralized—I do not wish to use a stronger term; only anyone who observed the conditions as they existed then would apply a stronger term. In 1897 I began in the bituminous fields to inaugurate a movement for the purpose of establishing a minimum scale. Oh, what a struggle it was; what a terrific struggle, involving privations and sacrifices. But the miners were accustomed to live on little, and it did not involve so very much to live on a little less. Finally an agreement was reached, and it made sure its work; its influence extended into the anthracite regions, and there the movement went along. And it finally produced results several years afterwards, when the miners went out on their strike in 1901. We all know what that meant. We all know not only the sufferings of the miners, but that the terrible conditions prevailing in the anthracite coal regions were exposed to the world's horror. They made a struggle, an heroic effort. We know how that coal strike either affected or threatened to affect all of us. The strike came to an end. It was adjusted. Certain improved conditions came about in the hours of labor; in the conditions of employment; in the right to expend their labors where they would, where they preferred, and so on. It improved their condition, so that the miners generally of the United States occupy about as good a position, as good an average position, in the economic and material world as do the workmen of most other trades and among the best paid trades. Now, you know the conditions there were in West Virginia; you have read them; some of the committees of Congress have made investigations.

The same conditions in a degree existed in Colorado, and now the miners, the coal miners, are threatened with a reduction in wages, due to the conditions which have prevailed and still prevail to a large extent in West Virginia and which prevail in Colorado. Now either they must concede to these employers of these districts—after these hard won battles—concede to these employers the right to reduce wages, or they must try to secure better wages and better conditions for these miners in West Virginia and in Colorado. And, gentlemen, because the miners in their organization, the United Mine Workers of America, prefer to appeal to their employers to secure better conditions for the working miners, the officers of this organization have been indicted by the Federal grand jury as criminal conspirators in illegal restraint of trade under the provisions of the Sherman anti-trust law. They may send these men to jail; may send them to prison; but is that going to solve the question? Is that going to

satisfy the need? Is that going to rid the country of any inconvenience which may be occasioned by the exercise of the activities of the working people, either individually or as a group, or as an association? Does any man fancy to himself that after all the struggles which have been made by the working people to secure for themselves the improved conditions in their work, in their lives, and in their homes, that they are going to give up these associations without a struggle?

Our organizations of labor in the United States are purely American in character, in conception, in growth, in development, in ideals, in idealism, in methods, and in operation. Indeed we hold and declare, much to the chagrin of some who in other countries and in our own, do not understand us—we hold and declare that this American labor movement of ours is purely American in government, in administration, in convention. We might liken it to Congress in the makeup of our organization, which is similar to our Federal Government. If I could take a moment of your time to indicate what I have in mind, I would do it. Let me say that we have, like the municipality, our local unions, or the central bodies of these local unions, which constitute the local movement and government; the State federation, which corresponds to the State government in territorial scope; we have our international unions, which form the integral part of the Federation and which have each of them their own self-government; and the American Federation of Labor, a federation of them all, possessing only such powers as are conceded to the American Federation of Labor by these affiliated and constituent bodies, and every other right and every other power reserved to themselves. So, I may say, we have the initiative and the referendum; we have a convention and we deal with the subjects affecting us, not only as workmen and work women, but affecting us as citizens. I venture to say, gentlemen, that if you will examine first the report of the executive council of the American Federation of Labor, made at the Seattle convention, which as I have said closed its work about two weeks ago—the convention held from November 12 to 22, 1913, inclusive—you will find here that the printed official proceedings of that convention, covering about 412 pages, deal with the questions affecting us, not only as workers, but as citizens and men, and deal comprehensively and I believe practically and wisely with a number of the great questions affecting us as a Nation. I am willing that this record of ours, a true record of the proceedings of this convention to which I have referred, shall be submitted for criticism to any humanitarian, to any economist, to any patriot who really loves liberty and justice and who aims to work for the progress of our Republic by law and with a due regard for human welfare and the advancement of our country. I challenge the world of critics and opponents to find a flaw, to find one minor chord, which does not express the highest and the best thought and hope for all the people of our country and our time.

Our organizations are going to exist. You can not drive them out of existence. Enact any law you please, make them criminal conspiracies and instruct the officers of the Federal Government with its Army and Navy, if you please, to drive out these organizations, and you will find that it can not be done and will not be done. All history illustrates this one fact, that whatever associated effort existed at

any given time in the history of the world; any associated effort which existed for the purpose of propagating the idea of liberty; the idea of freedom; the idea of human justice; the idea of bettering the lot of the poor devil who produces the wealth of the world—every effort to crush them out may have apparently succeeded, but what was then before them? The open movement of men who asked consideration for that which they had to present became the underground secret organizations, which held their meetings in subterranean passages or in woods and forests and had to bury their records, which only in the recent past have been unearthed and given to the world.

We aim in our movement to epitomize the struggles of labor throughout the ages. We aim to express the best thought and the hopes of the wage-earning masses of our country. We aim to accomplish the improvement of the condition of the toiling masses by gradual, natural, and evolutionary process. We present our demands to the conscience of the American people, and the declarations which I read here this morning as coming from the conventions of the national Democratic Party and of the national Progressive Party, these declarations were not made as a divination; it was not a personal inspiration; it did not come out of the clouds; these declarations were made in response to an agitation and a deep-seated feeling among the people of our country that these declarations, this legislation, were necessary. In response to that general feeling and that general demand the declarations were made.

Now, we come before you. We know that in many countries there have been formed among the working people, not only the organizations which I have tried to outline, but also other kinds of organizations, some of them supposed to be industrial, some of them supposed to be political. Indeed political parties have been founded under various names—the Independent Labor Party of England, the Socialistic Party of Germany and of Austria and of other countries; in the American labor movement, the American Federation of Labor. We are endeavoring to carry out our movement upon the theory recognized in American governmental work and development; that is, you say to us that there is no such thing as a wage-working class; the traditions in our lives preclude the possibility of asserting there are two or more classes; you say to us that there is no privileged class in the United States. I shall not attempt now to discuss or to criticise or to deny that proposition; but I do say that we are of your fellow-citizens and that a large part of your fellow-citizens, an overwhelming number of the voters of our country, have indorsed our legislative proposition by their votes. We ask relief. We ask that their will be put into effect by the enactment of this legislation, which is so essential for our very existence, our normal existence, that we may continue our work along our lines, and with the highest and the best motives and purposes and achievements, and thus, judging our future by our past, we shall proceed in the orderly development of our work and movement and bring hope and comfort and better conditions in the life of our fellow-workers. We ask that we may be permitted to go on with our work. We do not ask any immunity for any criminal act which any of us may commit; we ask no immunity for anything; but we have the right to existence, the lawful, normal existence as a voluntary association of workers, organized not for profit, but organized to protect our lives and our normal activities.

Mr. WEBB. Does this bill give you what you want? I understand from reading it that it gives you the right to fix your own standard of wages among yourselves; fix your own hours of labor among yourselves. But, now, does this bill give you the right to go further and do what I interpret your remarks mean you want done; that is, after you have formed this agreement among yourselves as to hours of labor and wages, to go still further and contract with a manufacturer, or with manufacturers, that they shall pay this particular wage and adopt these particular hours; and that if they do not adopt these wages and hours of labor, that you have the right to boycott them; and if they do adopt them they shall have no right to employ anybody else except one of your organization and upon the wages and the hours specified in your contract with them? Is that what you want accomplished, and is that accomplished in this bill?

Mr. GOMPERS. We think that that which we ask is accomplished in the bill—the right to own ourselves; the right to contract, whether singly or collectively, for our labor power; the right to control our wages and to expend them just as we will, without regard to the let or hindrance of anyone.

Mr. CARLIN. Mr. Webb referred to the right to boycott. Do you think that is included in this bill?

Mr. GOMPERS. I think it is. Of course, like the Quaker whose dog had stolen his piece of meat. He declared that it was against his faith to inflict pain upon him, but he said: "I will give thee a bad name, thou mad dog, mad dog," then began following up the dog and running after him and all the time shouting, "Mad dog, mad dog, mad dog," and the crowd joined in yelling, "Mad dog, mad dog," until some fellow took a club and struck the poor animal across his head and killed him. We call it boycott; then we hear of the primary and the secondary boycott. Boycott, as we have come to understand it, is not exactly as we undertake to exercise it. The question of the boycott, as we expected to exercise it and have the right, we hold, to exercise it, is the right either singly or collectively to bestow or withhold patronage upon anybody or from anybody. If we have our wages and go into a store and say: "We do not like the cut of your jib; we do not like your physiognomy; we do not like the color of your hair; or you are bald-headed, and we do not like to deal with a bald-headed man and we are not going to give you our patronage"—that is all there is to it. Or whether we say: "You are selling this book, which we regard as immoral or improper. We believe that in the manufacture of the book sweatshop conditions prevailed. We believe it is the work of some rum seller—put it as you please, upon any hypothesis, upon any ground, and unless you stop selling that book produced in that way, why, we will not only not buy that book from you, but we will not buy any other book from you. We will not buy any other book from you." What vested right has this man in my patronage or in the patronage of anyone else that the patron can not withhold it and bestow it as he pleases? That is all we understand and propose to exercise under the provisions of this bill when enacted into law.

As a matter of fact, let me describe to you what the American Federation of Labor has ever done, and the extreme cases which it has ever done in the case of what is known as boycott. An organization of working people, sometimes not so very well organized, if they

ever get into trouble with employers respecting them as wage earners, they appeal to us for aid. We first make an investigation, and then, after making an investigation and learning the cause of the trouble, endeavor to adjust it. If we fail in adjusting the dispute, and we find that the cause is that of the working people themselves, why we simply do nothing; if we fail in adjusting the dispute, and find that our own people were at fault in part or in whole, the matter is dropped; but if we, after our investigation, find that we were not only unable to adjust the difficulty, but that the difficulty was caused by and provoked by the employer, why we declare that we have made the effort of adjustment and have failed; that we have made an investigation and found that so and so was at fault; that he was unfair to his employees, and we say: "Secretaries of unions will please read this notice at their meetings and friendly and labor papers please copy." Now, after that would appear once, there was a list in the American Federationist under the title "We do not patronize this list." This I am quoting substantially. I do not want to be understood as quoting the exact language, but the essence and purport of it. "The following list of business men have manifested their unfair attitude toward their working people, and we have declared that we will not patronize them."

That is the sum total. There has never been from the American Federation of Labor, either by word or deed, or in print or in any other form of utterance or expression, a word that ever went forth of greater import or purport than I have mentioned just now, and yet under the process of injunction and the interpretation of the Sherman antitrust law by the Federal courts, we have been deprived even of doing that. We have gone along; we have increased in the memberships of the unions affiliated to the American Federation of Labor; more than a quarter of a million of men have come into our federation within this past year, and then we are asked: "If that be a fact, and you speak of it as if you are proud of it" (and I am), "why do you ask this legislation?"

I repeat that I am an optimist; I believe in the good and in the true and in the final outcome of the things, but you have got to do your duty and prevent the possibility of what may come. We may not always be fortunate enough to have men in the administration of the affairs of our country that shall deal fairly with these great problems and questions of these organizations.

Mr. CARLIN. Right along that line can you tell the committee what is the condition of labor to-day in the country? Is there any unusual amount of unemployed?

Mr. GOMPERS. I think not, sir; that is, not to any appreciable extent. Of course, one poor devil out of work, so far as he is concerned, the whole world might be out of work. He is suffering, and his family is suffering. I suppose there is not any change, any governmental change, which can be made in anything affecting industries at all, but what during the transition period some people will feel the effects of it.

Mr. CARLIN. But nothing beyond the normal?

Mr. GOMPERS. I think there is a little beyond the normal, but I am very sorry to find that there are some numbers of my fellow workers unemployed. It may be a little beyond the normal, but I

apprehend that it is due more to transition from one condition to another, rather than to any real depression.

Mr. FLOYD. I want to see if I understand your position. If I understand your position under the existing status of the law as determined by the Federal courts, if the Attorney General should proceed to dissolve any of your labor organizations they could be dissolved. Is that your proposition?

Mr. GOMPERS. Yes, sir.

Mr. FLOYD. And that your existence, therefore, depends upon the sufferance of the administration which happens to be in power for the time being?

Mr. GOMPERS. Yes, sir.

Mr. FLOYD. What you desire is for us to give you a legal status under the law?

Mr. GOMPERS. Yes, sir.

Mr. FLOYD. So you can carry on this cooperative work on behalf of the laborers of the country and of the different organizations without being under the ban of the existing law?

Mr. GOMPERS. Yes, sir.

Mr. CARLIN. In other words, you want to be exempt from the operation of the Sherman antitrust law?

Mr. GOMPERS. Yes, sir.

Mr. CARLIN. That is the only law which affects your operations, so far as your discussion goes this morning?

Mr. GOMPERS. Yes, sir. I hold that it first was the intention of Congress that the voluntary association of workmen and workwomen and of agriculturists and horticulturists with respect to the product of their own labor should not come under the provisions of that law, and that the Senate passed such an amendment. Then the House of Representatives, on one or two occasions, passed by a practically unanimous vote such an amendment. If you will look up the Congressional Record you will find an amendment, the Littlefield amendment to the Sherman antitrust law. When an amendment was offered we asked the Republican Members, then in control of legislation, to incorporate this amendment in their bill, and they refused, each one of them. Then we went to the Democrats and asked them whether they would. The amendment was offered to the bill from the floor and the amendment adopted, I think, with but eight or nine dissenting votes, and so I say that, as a matter of fact, at one time the Senate adopted the amendment while the present act was a bill before the Senate—adopted the amendment, and at other times, on one or two occasions, the House, by specific terms, adopted the amendment, and did so practically by unanimous vote.

We hold that it is a very far-fetched interpretation to characterize the officials of the voluntary associated workers and to place them under the same category as the trusts and corporations. How can there be a trust among workers in so far as their own labor power is concerned? A trust, as I understand it, is a combination to control products. Labor power is not a product. Labor power is inherent in and inseparable from the human body, the human heart, and the human soul. How can there be a trust in such a nonexisting thing, which does not exist and does not make itself manifest at all until it is exercised in the production of something?

Mr. MORGAN. May I ask this question right along that same line? As I understand these prosecutions and judgments and indictments against labor organizations are based upon provisions in the Sherman antitrust law?

Mr. GOMPERS. To a great extent; yes, sir.

Mr. MORGAN. Would it be satisfactory or accomplish the same purpose for you, instead of enacting the provisions of this bill, if you would simply amend the Sherman antitrust law by adding a clause something like this: "*Provided, however,* That nothing herein shall apply to labor organizations or agricultural or horticultural organizations." Would that cover the same ground as this bill?

Mr. GOMPERS. Substantially, yes, in so far as that is concerned; but yet the Bartlett bill is the result of the work of Senator Bacon and Representative Bartlett. There is not anything that we have to hide, and we have no desire to hide anything we do. We tell you that we have tried to prevail upon Senators and Representatives to favor the principles of the bill for which we are contending—these rights—we have tried to prevail upon them, tried to get them to see our point of view. Now, then, we had a number of bills—the Clayton bill, by the honorable chairman of this committee, passed in the House; the contempt bill, passed in the House in the last session. Neither of them gained much headway in the Senate.

Mr. CARLIN. You considered those good bills, though?

Mr. GOMPERS. Yes, dealing with these specific subjects. They did not, however, affect the status of the labor organizations, and I want to say that in this bill we endeavored to prevail upon Senator Bacon and upon Mr. Bartlett to advocate and support the passage of the Wilson bill—the bill by Mr. Wilson, of Pennsylvania—in the Sixty-first and Sixty-second Congresses, and they declared that they could not see their way clear to support that bill. They said that a bill could be drafted that would meet the subject in its entirety and cover it fully, both as to the question of relieving the organizations from the present status under the Sherman antitrust law and remedying the abuses of the issuance of injunctions and so forth, and so these two gentlemen collaborated and the Bartlett-Bacon bill is the result. I am sure I am not betraying any confidence when I say that our views were sought upon the bill and we were very glad to give it our indorsement, and, as I said, both at the conventionof the American Federation of Labor and——

Mr. CARLIN. The only way we can safely legislate for the future is to be certain we have learned proper lessons from the past. How has the legislation of this Congress, so far as we have gone, affected your organizations?

Mr. GOMPERS. I think it has been sympathetic and constructive. I ought to say in connection with that, sir, that for this legislation, good as it is, we could have waited a year, or five years if necessary, for some of it, providing the legislation affecting our very vitality were enacted. I might have to go without pie or beefsteak for some years and I could manage to get along without them, but I could not very well get along if you should deprive me of every means of nourishment.

Mr. CARLIN. This bill, or a bill accomplishing the same results in effect, were it passed in connection with what already has been passed,

I take it from what you have said, you would consider the whole subject of legislation favorable to the workingman?

Mr. GOMPERS. I think so; yes, sir. And I will say this, I would have a very hard time, I think, if I attempted to recall or to state all these splendid pieces of legislation which have been enacted. There have been more than those affecting the workers directly and specifically. What this bill really will mean if enacted into law is that it will just unfetter us and give us the right to live. If we now or at any other time are guilty of any criminal act; if we are guilty of any unlawful act; of any act that any other man or group of men can not perform, why we are subject to the general laws, as is every other citizen or group of citizens.

Mr. CARLIN. Is it not true that the present Congress has, at least in one measure which passed this extra session, given its approval to the principle involved in this bill? I refer to the provisions in the general deficiency bill?

Mr. GOMPERS. Yes, sir; the declaration—the question of the $300,000, for whatever purpose it might be expended, was practically insignificant, but it was a declaration on the part of Congress that that money should not be applied for the prosecution of men engaged in normal work, which is, in work not unlawful. It was a declaration that meant much; it was significant, and this is the logical sequence.

Mr. CARLIN. Do you not think it was practically an indorsement of the bill you support?

Mr. GOMPERS. There is no question about that.

Mr. MORGAN. I should like to pursue my question a little further, that I may have a little better understanding. I understand, then, that the provisions of this bill really go further than a provision would which would simply provide that the provisions of the Sherman Antitrust Act should not apply to labor organizations. In other words, there are some additional provisions in here that give you affirmative relief, so to speak, that you would not get simply by passing a proviso that the Sherman Antitrust Act shall not apply to labor organizations?

Mr. GOMPERS. Yes, sir; that is just the situation. The bill accomplishes the relief at once instead of by two separate measures. I may not be a very competent judge of the phraseology or the construction of a bill, but if I have any knowledge at all worthy of consideration I think that it is really one of the very best constructed bills that I have ever read, of any in which I have been interested. I do not know that I have anything to add.

Mr. CARLIN. Just one other question, Mr. Gompers. From your point of view, and the point of view of labor, does the workingman see anything in the outlook in the country in a business way to discourage labor at all?

Mr. GOMPERS. No, as balm in Gilead.

Mr. CARLIN. As balm in Gilead. In other words, everything looks hopeful?

Mr. GOMPERS. Yes, sir. I have spent some little time in trying to demonstrate to people who would not see that their conditions have been improved. I delivered a lecture on last Friday afternoon in New York bearing upon that phase of the subject, the improved

conditions which have come, but I am satisfied that we are going to have better conditions for the people of our country. I suppose that some people will be affected by the legislation of the Congress; will be affected by the activities of the working people in insisting upon improved conditions as a reward for labor, and the service they are performing to humanity. Somebody is going to be affected. It is an ill wind that blows no one good, and there is not any balmy day that brings relief to the millions that will not affect some poor individual very badly; there is not a thing that you can do that will not affect some one; but when legislation and human activities contribute so much to the welfare and the opportunities of the people, the incidental one who suffers, he is to be pitied, but the misfortune can not be helped.

I will say this in closing, that we are very anxious that this legislation shall be enacted at an early date. For Heaven's sake, if you are sympathetically inclined and will enact this legislation, please do not defer it until so late a day in Congress that when it shall pass the House it must run the gaunlet of the Senate, and then, in the closing hours of the Sixty-third Congress, we find our bill shunted aside, and that we have got to begin over and over again.

Mr. CARLIN. This same bill has been introduced in the Senate, has it not?

Mr. GOMPERS. Yes, sir.

Mr. CARLIN. And the Senate have the opportunity to act as early as they please. I think this committee, if they act at all, will act promptly and at an early day, and it might be well for you to look after the Senate a little now. Get them stirred up.

Mr. GOMPERS. We will try that, but for Heaven's sake do not let us be hung in the air. If Congress does not want to enact this bill, I do hope that it will be said early.

AFTER RECESS.

The committee met at 12.30 o'clock p. m., Hon. Henry D. Clayton (chairman) presiding.

Present: Representatives Carlin, Floyd, Dupré, McGillicuddy, Mitchell, Nelson, Danforth, Volstead, Henry, McCoy, and Thomas.

STATEMENT OF HON. A. O. STANLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY.

Mr. STANLEY. Mr. Chairman and gentlemen of the committee, I have a bill before this committee which I ask to be amended by inserting "from and after January first, nineteen hundred and fifteen," or some other such date as the committee may deem fit.

The CHAIRMAN. What is the number of your bill?

Mr. STANLEY. H. R. 5703.

The CHAIRMAN. You want the text of it amended so as to make it effective January what time?

Mr. STANLEY. I would suggest January 1, 1915, or such time as the committee may deem advisable. That is a matter of detail.

The CHAIRMAN. The text of the bill is what?

Mr. STANLEY. The bill provides that no person who is engaged as an individual or as a member of a partnership or as a director or other officer——

[H. R. 5703, Sixty-third Congress, first session.]

A BILL To prohibit persons engaged in the manufacture and sale of railroad cars, locomotives, railroad rails, and structural steel, or in the mining and sale of coal, from becoming directors or other officers or employees of railroads engaged in interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after June thirtieth, nineteen hundred and eleven, no person who is engaged as an individual or as a member of a partnership, or as a director or other officer or an employee of a corporation, in the business, in whole or in part, of manufacturing or selling railroad cars, or locomotives, or railroad rails, or structural steel, or mining and selling coal, shall act as a director or other officer or employee of any railroad company which conducts an interstate-commerce business.

SEC. 2. That any person who shall be guilty of a violation of this law shall be punished by a fine of $100 a day for every day during which he shall act as a director, officer, or employee of the railroad company, or by imprisonment for such period as the court may designate, not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

This is a very short bill; it says in very few words exactly what it means, and if this committee means to enact any legislation forbidding interlocking directorates, combinations between industrial concerns which are manifestly pernicious, why it will enact this measure. I have taken occasion to call the attention of the committee to these particular abuses because it is the most manifest, the most indefensible, the most crying offense of the kind in the whole range of combinations in restraint of trade, the immediate effect of which is to maintain at an exorbitant price the cost of a product. The evil results of the close relationship between common carriers and those who produce the things which common carriers use has been illustrated so often, has been demonstrated so often, that it would be a waste of time for this committee to hold hearings on the subject. In addition to that, I do not believe that there is a liberal railroad man in the United States who will come before this committee and oppose this measure. When I was chairman of the committee which investigated the steel corporation men like Percival Roberts, a director in the United States Steel Corporation and a director in the Pennsylvania Railroad, admitted that this sort of thing was an abuse, a bad practice—the close relations between industrials and carriers. Mr. Wood, the vice president of the Pennsylvania Railroad, when asked the direct question if common carriers should be permitted to own and operate industries or if industries should be permitted to own and operate common carriers waited, as Judge Danforth will remember, for a moment or two before answering; he weighed his words very carefully and then said, in effect, that the practice was indefensible. Julian Kennedy, in my opinion the greatest engineer engaged in the business of constructing great steel plants, flour mills, blast furnaces, and so forth in this country and in Europe, who constructed the furnaces at Gary and the furnaces for the Carnegie steel plant, who constructed like works in Indiana and China, dwelt at length upon this abuse. The Interstate Commerce Commission, in its report of February 22, 1911, Mr. Prouty, calls attention to this

evil resulting from the close relation existing between the makers of supplies for railroads and the common carriers, as follows:

The vice president of a railroad company testified during the hearing that his company could buy locomotives of the best two concerns; that on account of the freight rate, as a practical matter, it could buy Bessemer steel rails of only two companies; that structural iron of the larger sizes could only be procured from four or five companies; and that in the purchase of cars he was confined to seven or eight independent plants. It is well understood that in recent years the price of structural steel in larger sizes and of steel rails has been uniformly maintained. It is also well understood that the same men who are potential in the United States Steel Corporation and the American Locomotive Works are influential in directing the policy of our railroads.

Now, if, to use the popular nomenclature, the Steel Trust is to determine the price which shall be paid for rails and for bridges; if the Locomotive Trust is to determine the price of engines, the Car Trust of cars, and the Labor Trust of labor; and if the railways have only to meet the demands made by these combinations and charge over to the public by an increase of rates whatever is paid, a most unfortunate situation has developed. There is nothing in all this which enables us to say that railways do pay extravagant prices, and if we are satisfied that present rates do not yield an adequate return we should, notwithstanding these conditions of monopoly, unhesitatingly approve an advance; but in view of the monopolistic character of the business we should proceed with caution.

This bill seems to be an amplification of the commodities clause of the present act. The commission is of the opinion that unjust discrimination and undue preference will exist so long as a carrier competes with others in the marketing of commodities or properties. The producer or manufacturer who has no interest in a carrier must base his calculations upon his experience in producing or manufacturing, plus the lawful transportation charges of the carriers. The carrier that engages in the manufacture or production and also in the transportation can combine the two in such a way as to profit by the carriage if it does not profit by the manufacture or production, or to profit by the manufacture or production if it does not profit by the carriage.

The commission is of the opinion that carriers ought not to have any interest in the commodities which they transport. This does not go quite so far as to say that the law ought to prohibit a manufacturer or producer from owning some interest in the carrier, or an officer or director of the carrier owning some interest in the manufacturing or producing industry, but such interest ought not to be controlling.

Mr. WEBB. You have no doubt about the constitutionality of the bill?

Mr. STANLEY. None in the world. Mr. Webb, I take it that this committee has often reviewed the sweeping statements of the Supreme Court touching the plenary power of Congress over interstate commerce, from Gibbons and Ogden on down. You will remember such expressions, I think, in the Bauman case, in which the court holds that in interstate commerce there are no States. I take it that Congress has the same power over the public highways constructed from ties and rails that it has over a public highway called a navigable stream, and that it can use its own discretion in seeing who shall operate that highway and who shall not, and upon what terms and conditions it shall operate.

I hold that in a strict sense there is no such thing as a quasi public corporation, as that term is usually used. There is no such thing as a corporation that is half private and half public. A quasi public corporation is a public corporation, and it is private only in the sen e that the officers of the corporation, those who direct and manage ts affairs, are paid out of the earnings of the corporation and not from the public Treasury, but in every other sense they ar absolutely public servants; and that he who operates an interstate highway is a public servant, a Federal officer, and that he and his business is ab olutely in your hands and you can say who shall be its president, who

shall be its directors, who shall be its employees, and what shall be their charges, or legislate as to any other detail of their business with the absolute assurance that you are firmly upon jurisdiction defined and settled by innumerable decisions of the Supreme Court of the United States.

Mr. NELSON. Maybe you are just prohibiting a form of it as a director; but supposing the same party owns the two concerns, the stock, then how would you reach the evil?

Mr. STANLEY. I have other measures; I have now a bill which will shortly be presented to this committee which goes at length into that question. I do not mean to say, gentlemen, that this bill is sufficient to reach the whole matter.

Mr. NELSON. It merely reaches the directory form?

Mr. STANLEY. I merely reaches one phase of the directory form. I wish to be very brief here to-day, but I will say that this bill is not adequate at all to reach the evils incident to interlocking directorates. But you have two evils that confront you; first is the pernicious results of the intimate relations between those who are engaged in a public and those who are engaged in a private business. Now I hold, as a general proposition, that no man should occupy the dual relation of a comptroller in a public and in a private business. I hold that no man should have the right to operate a public business and a private business at the same time having a pecuniary interest in both, for the simple reason that it is easy enough for him in that event to pervert the business of the public through the aggrandizement of the private industry. He has two pockets in the clothes of the same man, one filled from the proceeds of the public business and the other filled from the proceeds of the private business. Now suppose the Interstate Commerce Commission, having plenary power to say how much he shall put in this pocket, puts a ban upon his earnings in the public pocket, if he can secretly divert the earnings of that public business to the private pocket he will inevitably do it, will he not? And that is exactly what they have done; and that will be remedied by legislation much more elaborate than this bill. This bill is intended to reach simply this: The manufacturers of the apparatus by which public carriers are operated; their rails and their cars and their locomotives and their fuel. In other words, I mean that the men who supply the tubes for their boilers and the plates for their boilers and the rails and the spikes and the like are also the men who sit on the boards of directors of these concerns.

Now, the Interstate Commerce Commission says that we will look at your earnings in order to determine the fairness and justice of your rates. It is impossible for the Interstate Commerce Commission to fix the tolls of a railroad like it fixes the tolls of a turnpike. It has the same power exactly, I maintain. You can say to the turnpike company: "You shall charge so much for a horse, so much for a head of stock, so much for a vehicle drawn by two horses, so much for an automobile of a certain horsepower", and so on; but you can not say to the railroad: "You shall charge so much for hauling a carload of sand and so much for hauling a ton of rails, and so much for hauling this, that, and the other thing"; it is a more complex business, and you are bound to give to the roads a wide discretion in the classification of freight and in the fixing of its tariffs, because they are affected by other roads reaching the same points. They

are affected by the competition of water carriers; they are affected by the cost of construction, and you can not lay down those simple hard and fast rules. And so, as an inevitable result, the Interstate Commerce Commission has looked at the capitalization of a railroad, and if it is anything like justly capitalized you will find from all of these advanced-rate cases that they then have said: "If you are making, say, 7 per cent on your preferred stock and paying 5 per cent on your bonds, your returns are the most available measure of the justice of your rates"; and they have said: "You may earn so much upon a fair or an approximately fair capitalization."

Now, the railroads know that their earnings, their nominal earnings, are in fact the measure of their tariffs, and if they earn 10 per cent on their preferred stock and 4 or 5 or 6 per cent on their common stock it will not be long before some man will come in and complain of the rate, and he will call attention to their enormous earnings, either based on their capitalization or based on the train mileage or based on the ton mileage, or based on some of the standards by which the earnings of roads are measured. In that event, if the earning is excessive, the rate probably will be cut; but if the railroad shows that by these various standards it is only earning what other roads are earning, the Interstate Commerce Commission will say that this rate is only a fair compensation for the services rendered and for the capital invested. So, do you not see it is to the interest of great railroad companies to conceal their earnings, and there is no more perfect measure of the concealing of that earning than for the same man who owns the railroad to also own and operate the concerns that supply the railroad; and they can by diverting the earnings of the railroad to the betterment of the private enterprise—that is, supplying the railroad with rails or cars or engines—they can put into another pocket, so that it can not be seen by the commission, any amount of net earnings, and as a result the earnings of the railroad appear normal, but no one knows how much has been paid for supplies at the exorbitant figure. And, as the Interstate Commerce Commission has shown you, the best proof of the fact that the railroads themselves are not concerned about the cost of their own equipment and operation is that notwithstanding the fact that T rails, for instance, such as you may use in mines and on these streets, go up and down; notwithstanding the fact that these little T rails that they use in your coal mines, for instance, must be run through the roller just the same number of times as a rail that is 120 pounds to the yard. The relative cost of producing a ton of small rails is much greater than a ton of large rails, because there is the same amount of labor expended, practically. They must be cut and the holes must be bored in them, yet 1 ton of these little-car rails will contain three times as many rails as a ton of these massive rails used on the railroad, and yet the little rail is made at a greater cost but sells at 20 per cent per ton less than the big rail, and it only does that for the reason there is an understanding between the maker and the user of the rail that it shall not be sold for any less, as the Interstate Commerce Commission said.

Mr. DANFORTH. How are you going to stop this practice by this proposed bill? Take this bill, I say?

Mr. STANLEY. This bill will stop it in this way. It will prevent the man who is making the rail, or making the locomotive, or making the plates, from having any interest in or any control over the rates of this company, or over its operation.

Mr. DANFORTH. Have you not got to forbid that man being a stockholder and owner of the two enterprises before you can reach that?

Mr. STANLEY. I would.

Mr. DANFORTH. But this bill will not do it?

Mr. STANLEY. I do not mean to say that this bill will do the whole thing.

Mr. MORGAN. It puts in a dummy, does it not?

Mr. STANLEY. No; it is productive of good results.

Mr. DANFORTH. What is to prevent them from putting in a dummy?

Mr. NELSON. Assuming that you do not follow it with a provision of ownership of stock, would it not be very easy to get around your bill?

Mr. STANLEY. It will stop a great many of the bad practices. For instance, I will give you an instance now from the Department of Justice, and which has been passed on by the Interstate Commerce Commission.

The Louisville & Nashville has a freight agent who is in charge of a boat line, and the boat line charges the same rate that the railroad does. Here is a man who is making these cars; he is also an agent and director in the company that is using them. It is very easy for him to sit one day as the director of the railroad company and the next as the director of the manufacturing company—and that is the way prices are fixed—and fix the price the railroad shall pay for his rails—and it is very easy the next day for him to sit as the director in the manufacturing concern and fix the price that he shall charge for the rails. He is both buyer and seller.

Mr. NELSON. I am somewhat in favor of your position, but it seems to me you ought to unite the two remedies, so there will be complete relief.

Mr. STANLEY. I do not mean to stop here. I mean to say that this relief, this thing you can pass now, and the further relief will come. And I will tell you that I have talked with the President about it, and I do not think I betray any confidence when I say that I am sure he is not opposed to it. I would go further, much further, and I would provide, and will provide, that no man—that no concern that is engaged in the business of manufacturing or producing anything of value suitable for commerce—shall be an officer or a director in any concern engaged as a common carrier; and that no man holding stock in any common carrier and also holding stock in any industrial concern supplying that common carrier shall vote his stock in the common carrier. I would go further than that. But I did think that this specific measure, with a heavier penalty than is provided in the other bill, should be passed. You will recall but recently an investigation into the affairs of the Pennsylvania Railroad, in which it developed that the officers of the railroad were also officers of these coal companies, and the frightful abuses that resulted from it, and it is a notorious fact that all over the country you have men employed in coal companies who are also interested in railroads.

Mr. FLOYD. I will ask if it did not develop the fact that they were not only officers, but owned the entire stock in the coal companies?

Mr. STANLEY. Yes; that condition prevails in my country. And whenever you find a railroad owning, by stock ownership or otherwise, a coal mine in any particular section, the other coal mines wither and decay; they can not stand the pressure.

I now wish to call your attention to a statement of the Interstate Commerce Commission, not in reference to this bill, but touching the general principles of a bill pending.

I have a great many bills before this committee now, but in collaboration with some of this committee I am trying to weld them all into one measure, so you can reach them more adequately than you would by taking up separate bills, but I think this bill should be passed first for several reasons. In the first place, there is much talk that we are going to smash business, and I fully appreciate the fact that in legislation affecting the detail of these great businesses of this country we are sailing between Scylla and Charybdis. Any ill-digested legislation smashing the heads, you see, even though it strikes at abuses, will cause trouble, cause consternation in this country, and it might cause panics. For this reason I think it is advisable for this committee to carefully weigh not only the facts that the legislation is meant to remedy an existing abuse, but that the remedy is such as to prevent the abuse, like a skillful surgeon would take out a cancer and leave legitimate operations uninjured and undistrubed. This bill, while it is intended only to prevent one single, solitary abuse, is so simple, so directly aimed at a thing so manifestly wrong, that I believe it will cause no fright to business; in fact that it will reassure business, because no great business man is going to fail to see that he can not be harmed unless he means to profit by not only what ought to be unlawful, but what is merely dishonest; and at the same time it will remedy one particular phase of the situation that needs immediate remedying. I thank you.

Mr. FITZHENRY. A great many courts hold their meetings this month and next month, and should this matter not have immediate attention?

Mr. STANLEY. Yes; I think it ought to have immediate attention.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, December 19, 1913.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. You may proceed, Mr. Morgan.

STATEMENT OF HON. DICK T. MORGAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA—Continued.

Mr. MORGAN. Mr. Chairman and gentlemen of the committee, I appreciate the courtesy you have extended me and I have reduced to writing what I wish to say, which will be the quickest way of presenting the matter. While perhaps you will not all agree with my ideas, I think in the main you will find that the propositions which I

will present are at least different from the propositions in any of the other bills on this question.

In my address before the committee on the 9th of December, upon my bill, H. R. 1890, I confined my remarks mainly to the provision of the bill which creates a national commission to have supervision over our large industrial corporations. I attempted to show that such a commission should be created without discussing in detail what power or jurisdiction should be given the commission. I took the position that a commission was desirable—even though no additional statutes were enacted to further regulate these corporations.

I presented ten propositions in support of my contention for the creation of such a commission. These ten propositions stated very briefly are as follows:

1. The Republican and Progressive platforms of 1912 specifically indorsed such a commission and the Democratic national platforms have declared for a program of antitrust legislation, which could not be enforced or administered successfully without additional executive and administrative machinery.

2. That the commission plan had been indorsed by Senators and Representatives in Congress, Government officials, editors, educators, political economists, merchants, bankers, manufacturers, and business men generally.

3. That the business interests of the country were favorable to the creation of such a commission, including not only merchants, manufacturers, and bankers, but the men at the head of some of our great industrial corporations.

4. That the majority of the Senate Committee on Interstate Commerce, Sixty-second Congress, after an exhaustive hearing on the subject, reported in favor of the creation of such a commission.

5. That a commission would be useful if for no other purpose than to aid in the dissolution and reorganization of unlawful corporations.

6. That the commission was desirable to do the work now assigned to the Bureau of Corporations, so that without any additional restrictive or prohibitory legislation, it would be wise to merge the Bureau of Corporations into a commission, and give the commission the additional work of aiding the courts in the dissolution and reorganization of unlawful corporations.

7. That any additional restrictive, prohibitory, or remedial legislation on the subject makes a commission imperative and indispensable.

8. That a commission, without any power to fix or regulate prices, would be a potential force in restoring and maintaining healthful and effective competition, as a factor in regulating the prices of all food products, merchandise, and manufactured articles, and thus the commission would aid in solving what is now known as the high-cost-of-living problem.

9. That the incomparable achievements of the Interstate Commerce Commission, in largely solving the problems of railway charges and practices justifies the placing of our large industrial concerns under the supervision of a similar commission.

10. That many of our industrial corporations are in fact quasi-public corporations, and should be made such by statutory enactment, and hereafter be classified with railways, telegraph, telephone, and other public-service and public-utility corporations.

SALIENT PROVISIONS OF H. R. 1890.

I will now discuss some of the salient provisions of the bill (H. R. 1890) which I have introduced. Some of these provisions may be enumerated as follows:

1. The creation of the commission (sec. 1), and the provisions which define the corporations which shall be subject thereto (sec. 1).

2. The declaration that all corporations subject to the commission are quasi-public agencies or corporations (sec. 2).

3. The provision requiring such corporations in conducting their business to use only such practices, methods, and means as are just, fair, and reasonable and not contrary to public policy or dangerous to the public welfare, and making it unlawful to do otherwise (sec. 4).

4. The provision requiring such corporations to deal justly and fairly with competitors and the public and prohibiting the granting of special privileges or advantages which shall be unjustly or unreasonably discriminatory as between individuals or sections of the country (sec. 5).

5. Giving the commission power to enforce these provisions, and make rules and regulations not in conflict with the Constitution d laws of the United States, to aid therein, and by such rules and ulations to prohibit any particular or specific act or acts, practice, method, or device that is contrary to any of the provisions of the act (sec. 9).

6. Requiring such corporations to sell their products at just, fair, and reasonable prices, and making it unlawful to do otherwise (sec. 3).

FIRST. THE COMMISSION AND CORPORATIONS SUBJECT THERETO.

Section 7 creates the "Interstate Corporation Commission." The name is immaterial. With equal propriety it might be called the Interstate Trade Commission, the National Industrial Commission, the Federal Trade Commission, the Federal Antitrust Commission, ar by any other name that will not confuse it with the Interstate Commerce Commission.

The commission consists of seven members. Each member is allowed a salary of $7,500 per annum. The number on the commission, the salary of the members, the length af their terms, and many other details are minor matters.

Every corporation engaged in interstate commerce, not subject to the jurisdiction of the Interstate Commerce Commission, whose gross annual receipts or the total annual gross receipts of whose subsidiary companies are in excess of $5,000,000 are made subject to the provisions of the act. Some other test might be adopted to fix the kind and character of the corporations which shall be made subject to the commission. In determining what corporations shall be placed under the commission, gross receipts should be considered, but in addition thereto we might well consider the capital invested, and the nature and character of the business.

The terms of the law should be such that only corporations which may be clearly classed as public agencies, or quasipublic corporatians should come under governmental control. So far as may be consistent with the public good, we should leave the business of the country free

from governmental control, giving to individual initiative, energy, ability, and ambition the widest field possible in the development and management of the business and commerce of our country.

SECOND. CORPORATIONS SUBJECT TO THE COMMISSION SHALL BE DECLARED QUASI PUBLIC AGENCIES OR CORPORATIONS.

If we are to assume governmental control of any of our industrial corporations it must be done on the ground that the business of such corporations have become impressed with a public use and the corporations themselves have ceased to be merely private concerns, and must henceforth be regarded as quasi public corporations.

It is maintained that these corporations are creatures of the times; that they are the natural product of twentieth century conditions; that they are the offspring of science, discovery, and invention; that they are the natural result of the wonderful improvement in transportation and communication facilities; and that they typify the advanced civilization of the age.

It is further claimed that they are useful; that they are economical; that they avoid waste in production; that they are favorable to labor in securing steady employment, remunerative wages, short hours, and favorable conditions under which to labor.

As other nations have large corporations, it is asserted that we must have them or we can not compete in the markets of the world. All these things may be true. If so, the more certain it is that the giant corporations, with hundreds of millions of capital, controlling the production, distribution, and sale of products in common use among all our people, possessing unquestionably large monopolistic power in the control of prices, are quasi public corporations, and as a matter of wise public policy should by law be declared to be such.

THIRD. FAIR, JUST, AND REASONABLE PRACTICES.

The Federal Government long ago entered upon the policy of controlling the practices of industrial corporations engaged in interstate business. The Sherman antitrust law controls the practices of such corporations. That law forbids the doing of certain things. When we prohibit corporations from doing certain things, we thereby assume the right to control the practices and methods of such corporations. So far, however, the law only prohibits certain acts. We have not fixed any standard by which the business methods of such corporations shall be judged. There are those who seem to think that we should confine our legislation to statutory provisions prohibiting industrial corporations from doing this or that thing. It is well enough to prohibit certain acts—to make certain things unlawful—but we should do more than this. We should by law promulgate a rule of business morality, create a standard by which the methods and practices of industrial corporations shall be judged. I have attempted to do this in section 4 of H. R. 1890. This section is as follows:

SEC. 4. That every practice, method, means, system, policy, device, scheme, or contrivance used by any corporation subject to the provisions of this act in conducting its business, or in the management, control, regulation, promotion, or extension thereof, shall be just, fair, and reasonable and not contrary to public policy or danger-

ous to the public welfare, and every corporation subject to the provisions of this act in the conduct of its business is hereby prohibited from engaging in any practice, or from using any means, method, or system, or from pursuing any policy, or from resorting to any device, scheme, or contrivance whatsoever that is unjust, unfair, or unreasonable, or that is contrary to public policy or dangerous to the public welfare, and every act or thing in this section prohibited is hereby declared to be unlawful

These great business corporations should not be permitted in conducting their business to engage in practices, use methods, or resort to devices that are not just, fair, and reasonable. Big business should have a high standard of business ethics. Whether corporations have souls or not, they should be compelled, in the management of their business and in all means, methods, schemes, devices, and contrivances used for the enlargement and extension of such business to keep clearly within the bounds of the principles of sound morality. While I believe the business of this country is, in general, conducted along lines of high moral principles, Congress might well promulgate a new code of business ethics for the guidance of the managers of the great industrial corporations.

FOURTH. JUST AND FAIR TREATMENT TO THE PUBLIC AND COMPETITORS.

Section 5 of H. R. 1890 supplements section 3 in fixing a standard for our industrial corporations to follow in dealing with the public. Think of it. At the present time there is no law except the Sherman Antitrust Act which in any way limits, restricts, regulates, or controls the business methods of industrial corporations. So long as they do not violate some general criminal statute or the provisions of the Sherman antitrust law, corporations may resort to all kinds of acts and practices which are unfair to competitors and inimical to the public. They may, with perfect impunity, treat competitors unfairly and discriminate against localities, and be guilty of all kinds of business immorality. And we are talking about big business—about corporations with immense capital—having a large degree of monopolistic power. Why not enact a statute which will crystallize the sentiment, the judgment, and the conscience of a nation into a rule of action for the guidance of these great business concerns in dealing with competitors and the public? This I have attempted to do in section 5 of my bill, which is as follows:

SEC. 5. That every corporation subject to the provisions of this act shall deal justly and fairly with competitors and the public, and it shall be unlawful for any such corporation to grant to any person or persons any special privilege or advantage which shall be unjust and unfair to others, or unjustly and unreasonably discriminatory against others, or to enter into any special contract, agreement, or arrangement with any person or persons which shall be unjustly and unreasonably discriminatory against others, or which shall give to such person or persons an unfair and unjust advantage over others, or that shall give to the people of any locality or section of the country any unfair, unjust, or unreasonable advantage over the people of any other locality or section of the country, or that shall be contrary to public policy or dangerous to the public welfare, and any and all the acts or things in this section declared to be unlawful are hereby prohibited.

This section is modeled after sections 2 and 3 of the act of February 4, 1887, entitled "An act to regulate commerce" (24 Stat. L., 379). The two sections are as follows:

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation

for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

These provisions in the "Act to regulate commerce," with supplemental legislation along the same line, have resuletd in driving from the railway transportation business by far the greater part of the practices and methods of railway corporations, about which, for a long time, there was so much just complaint. There is now little complaint of unfair discrimination as between individuals or sections of the country.

In other words, the provisions in the act creating the Interstate Commerce Commission, which I have quoted, under the administration of the Interstate Commerce Commission, have resulted in the main in giving to the public just and reasonable rates, to individuals and localities equality of charges, and to all impartial privileges and facilities.

May we not fairly conclude that by promulgating similar fundamental rules of action for the guidance of our mammoth industrial corporations, and by creating a like commission to administer and enforce these rules of action, we may expect equally good results upon the methods and practices of our great industrial institutions?

FIFTH. POWER OF COMMISSION TO MAKE REGULATIONS.

One paragraph in section 9 of H. R. 1890 is as follows:

The commission is hereby authorized and empowered to make and establish rules and regulations not in conflict with the Constitution and laws of the United States to aid in the administration and enforcement of the provisions of this act, and may, by such rules and regulations, prohibit any particular or specific act or acts, practice, method, system, policy, device, scheme, or contrivance that is contrary to any of the provisions of this act.

Under this provision of the bill the commission not only has power to make rules and regulations to aid in administering and enforcing the provisions of the bill, but may by such rules and regulations prohibit any particular or specific act, practice, method, system, policy, device, scheme or contrivance, which is contrary to any of the provisions of the act.

It will be well for Congress to prohibit any known act or practice hitherto indulged in by corporations, by which the public has suffered, but it is safe to say Congress will cover by enactment only conspicuous abuses. The commission should therefore have power to prohibit

by rule things which are contrary to the general rules enunciated by the law. Congress acts with deliberation. It takes time to enact laws. The commission can act quickly. Besides, the corporations may adopt new practices which are offensive. If they are contrary to the broad rules of action, enunciated by the law, the commission may quickly make a rule that will make the practice unlawful.

SIXTH. CONTROL OF PRICES.

We come now to consider the question of whether or not the Government shall undertake to exercise any control whatever over the prices at which corporations, subject to the supervision of the commission, shall dispose of their products. I desire to present a number of propositions which have led me to the conclusion that the commission should have certain power to regulate prices.

So far the Federal Government has not assumed to exercise any control over the prices at which industrial corporations dispose of their products. We have proceeded on the theory that competition shall be the one great force upon which we shall rely for the regulation of prices. Our policy has been to restore and maintain competition. Unquestionably existing laws have not been adequate to do this. In spite of the Sherman Antitrust Act, in spite of the weapon of publicity as wielded by the Bureau of Corporations, in spite of prosecutions, proceedings, findings, decrees, and judgments rendered in the United States courts, combinations have been formed, concentration of business has continued, industrial corporations have enlarged their capital, increased their output, extended their business, perfected their machinery, equipment, facilities, and organizations, and persisted in acquiring those things which added to their arbitrary control and domination of the prices, at which they sell their products. Competition is not the controlling factor in the fixing of prices of many articles in common use among the masses of our people. It can not be denied that many of our great industrial corporations, largely controlling the manufacture, sale, and distribution of many articles in common use, possess arbitrary power to fix the prices at which they sell such articles. This is a power that should not be lodged in the hands of individuals, firms, associations or corporations. The National Government is derelict in its duty if it does not exercise every constitutional power to prevent it.

We rail against monopolies from the housetops. We defiantly brandish in the faces of these big corporations, we brandish defiantly the sword of competition. They refuse to be frightened, and proceed to take possession of additional territory on the map of the industrial world. Thus for more than a quarter of a century this process has been going on. Competition has been losing ground. The sphere of its influence has been lessened. The field wherein its power is dominant and supreme, has constantly diminished. Competition has fought its great decisive battle, and met its Waterloo.

Those who advocate some governmental control over prices do not contemplate that we shall abandon competition as the one great factor in the regulation of prices. Our policy is to reenforce competition, with a certain degree of governmental supervision and control. We propose to enact a law that will meet conditions as they are. We can not change these conditions in a moment, in the twinkling of

an eye. No one would advocate the enactment of antitrust laws that would produce an industrial cataclysm. And yet no other kind of legislation will eliminate monopoly as an important factor in fixing the prices consumers pay for many of the articles in common use among our people.

I take it that we all agree that prices should not be controlled by monopolistic industrial conditions. Governmental control of prices should never enter the field where competition is efficient and effective. Control should only be assumed in the domain where competition has ceased to be an efficient and effective force.

Mr. CARLIN. Is it your idea that this commission ought to fix retail and wholesale prices of articles?

Mr. MORGAN. My idea is that we should by law declare that the corporations which we make subject to this commission shall dispose of their articles at reasonable and just prices, just as we declared that the railway corporations shall make their charges reasonable and just.

Mr. CARLIN. For instance, what would you require a sugar corporation to charge for sugar or a grain corporation to charge for flour?

Mr. MORGAN. I would require them to charge a reasonable price. For instance, assuming that a large monopoly exists among the great packing companies in disposing of their products, I would have them by law required to sell at reasonable and just prices, and the commission could pass upon the question as to whether those prices were reasonable and just with the same degree of accuracy and just as practically as a commission can declare that a certain railway rate is just or unjust.

The CHAIRMAN. But there is this difference between products and railways. Now, a railroad is engaged in a public business. It acts in a public capacity and with that view it is given the right to construct railroads, a right of condemnation, and it is a public servant. But a man engaged in the manufacture of sugar or in the production of flour or in the production of wheat is not acting in any sort of a public capacity.

Mr. MORGAN. Now, Mr. Chairman, that, of course, is a very forcible and apt suggestion, but a corporation is an artificial person created by law and that corporation by virtue of the privilege of the law is engaged in interstate commerce.

Mr. CARLIN. Does not your bill apply to persons as well as corporations?

Mr. MORGAN. No, sir; and then only to corporations whose annual receipts are in excess of $5,000,000.

Mr. MCCOY. Potentially and individually a partnership can indulge in just as evil practice as a corporation. Why not make it apply to individuals as well as corporations?

Mr. MORGAN. Well, history and experience show that individuals and firms can not extend their business in such a way as to get control of the great articles in common use among the people. It never has been done.

Mr. CAREW. Is not the Nelson-Morgan Co. a partnership?

Mr. MORGAN. I do not understand that.

Mr. CAREW. That is my information.

Mr. CARLIN. Then your bill also provides for a commission to fix the price of labor.

Mr. MORGAN. No, sir; it is confined strictly to fixing the prices of those corporations which we shall declare by law to be quasi-public corporations. In other words, that is the only theory upon which we can proceed unless we go into the entire field of controlling prices of all articles sold by all individuals. But in order to do that we must proceed upon the theory that corporations like the United States Steel Corporation, the Standard Oil Co., and the International Harvester Co., by virtue of the control which they have gained over the manufacture, sale, and distribution of products in common use among a hundred million people, have been in fact and should be in law regarded as public corporations.

Mr. WEBB. Is that the only class of corporations that you define as public, the big ones? How would you define a public corporation?

Mr. MORGAN. I have defined it in my bill by declaring that a corporation in order to come under the provisions of this law, under its restriction and control, must have an output of $5,000,000 annually.

Mr. NELSON. How many different corporations would come under the provisions of your bill?

Mr. MORGAN. According to some estimates I have made, probably 300 corporations.

Mr. NELSON. And would one commission be able to regulate the price of the product of 300 combinations so large as that?

Mr. MORGAN. I thould think so.

Mr. NELSON. Would you not have to consider wages in order to fix the value and prices?

Mr. MORGAN. Certainly.

Mr. NELSON. And raw material?

Mr. MORGAN. Yes, sir.

Mr. NELSON. And taxation?

Mr. MORGAN. Yes, sir.

Mr. CARLIN. And transportation?

Mr. MORGAN. Yes, sir.

Mr. NELSON. Would not you have to go into all the different details of the business?

Mr. MORGAN. Did not we have to consider all those things in fixing a reasonable price for the transportation corporations or communication corporations? It is only a question of detail and organization.

Mr. CARLIN. Well, right there, on that question of detail and organization. If you only apply this remedy to corporations all these gentlemen would have to do would be to change their form of organization from a corporation to a partnership.

Mr. MORGAN. Of course, Mr. Chairman, I am talking about general theories. Now, if the committee or Congress should seriously think of undertaking the proposition that I have proposed, then we could all get together and suggest the remedies for such things as you have in mind. Those things are to be worked out in detail; it could not be expected that one person in preparing a bill of this kind could meet every proposition that could be presented.

Mr. DANFORTH. Mr. Morgan, as suggested by Mr. Carlin, would not that necessarily force this commission to consider the prices fixed by partnerships?

Mr. MORGAN. Well, I think not. No; I think not.

Mr. DANFORTH. Did not these corporations, when they were partnerships, and most of them were at one time, do practically as large a business as they are doing now as corporations, and did not they control the output?

Mr. MORGAN. Well, under my bill I say "corporations," and if that question comes up we can say, "Any corporation, association, or firm having business of this size."

Mr. CARLIN. If the principle of your bill is applied to human efforts all along the line, because if it is a good thing for one class of business it is a good thing for all classes of business, you would eventually fix the prices of all articles?

Mr. MORGAN. Well, I do not think that is a matter of argument now. We have entered upon the policy of fixing the prices of transportation, communication, and public-service corporations, and we are doing that successfully. Now, then, this proposition is just as practical as the other one. There are many details to be worked out.

Mr. VOLSTEAD. Are we not doing nothing more than equalizing the prices? My experience has been that about all we did was to compare one price with another, and if the price complained of was higher than the general average of prices in that locality, under those circumstances the Interstate Commerce Commission would reduce it in order to equalize prices. I think that is pretty nearly as far as we have gone.

Mr. MORGAN. Yes, sir; that is probably as far as we would go, but it is not far enough.

For one, I am ready to take this step. In the preparation of H. R. 1890 I have provided for a plan of limited control of prices of the products of industrial corporations, placed under the supervision of the commission. Section 3 of my bill covers this ground and is as follows:

SEC. 3. That the price or prices at which any corporation subject to the provisions of this act shall sell or dispose of any article of merchandise, or any product whatsoever, shall be just, fair, and reasonable, and it shall be unlawful for any such corporation to sell or dispose of any article of merchandise, or any product whatsoever, at a price or at prices that are unjust, unfair, or unreasonable, and every corporation subject to the provisions of this act is hereby prohibited from so doing.

Assuming that we shall declare by law that all corporations placed under the control of the commission are quasi-public corporations, my plan is to regulate their prices much as we regulate the rates and charges of railway and other public-service corporations.

When the Congress of the United States enacted the first law giving the Federal Government supervision and control over the great railway corporations, it imprinted upon the pages of our Federal statutes a few simple rules which have ever since controlled the charges and practices of all our great railway systems. In the very first section of the act to regulate commerce, approved February 4, 1887, and which created the Interstate Commerce Commission, Congress declared:

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just.

And every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Ever since February 4, 1887, in all the controversies and proceedings before the Interstate Commerce Commission and in the United States courts, the one great question in controversy has been, Are the rates and changes of the railways reasonable and just? That is the test applied to every charge for service in railway transportation. The Interstate Commerce Commission, the courts of the land, the shippers, and the public generally have come to understand what is meant by just and reasonable charges. So in the preparation of my bill I reached the conclusion that the great industrial corporations, dealing in the necessities of life, possessing such control over a business that competition was not the greatest factor in price-making, should at least be required to dispose of their goods, wares, and merchandise at just and reasonable prices. Have I gone too far? Is it an infringement upon any natural right? Is it in conflict with the Constitution of the United States to require artificial persons—corporations—engaged in interstate commerce, and which have the same monopolistic power possessed by quasi public corporations, to dispose of their products at prices that are reasonable and just? Certainly not.

Would the Federal Government be asking too much of industrial corporations desiring to engage in the great interstate commerce of this Nation, reaching out to the homes of one hundred millions of people, that they should dispose of their products at prices that would be regarded as just and reasonable.

Is this radical legislation? Is it impractical? Will such legislation curb individual initiation, discourage enterprise, and prevent the growth and expansion of trade, commerce, and industry? I think not. Are we afraid of a shadow? Are we not halting before imaginary dangers?

The provisions of my bill give the commission power, on final hearing, to fix what shall be a reasonable price. In this I have simply followed the law which gives the Interstate Commerce Commission the power to fix the rates or charges of railways, telegraph and telephone companies, a power that was not conferred upon the commission until the act of 1910, passed by the Sixty-first Congress.

Now, that is the one proposition upon which all proceedings for a quarter of a century have turned in controlling the charges of railway transportation. Prior to that time the transportation corporations, so far as the national law was concerned, could do anything that they pleased. So, for the first time Congress declared in the very first section of that bill that their charges should be reasonable and just.

Mr. FITZHENRY. Was not that the law before that statute was passed?

Mr. MORGAN. I do not so understand it. I may be mistaken, but at the present time there is no restriction upon the price. Under the law the Steel Corporation may charge any price it pleases for steel rails. Instead of charging $28 a ton, they could charge $100 a ton.

Mr. WEBB. You look to the fixing of rates of railroads as a solution of the question?

Mr. MORGAN. I think it has contributed largely to that end.

Mr. WEBB. There are between five and ten thousand complaints pending before the Interstate Commerce Commission in regard to railroad rates, and it will take them about 10 years to pass on them.

Mr. NELSON. If that is satisfactory, how about this failure in New England, with reference to the New Haven Road?

Mr. MORGAN. As I understand that matter up there, it is a matter for the commission. I have provided here that their practices shall be reasonable. Of course, there is no way to entirely control a man from doing things that are wrong. You can not do that by any criminal statute.

Mr. VOLSTEAD. I am inclined to think that they might have done something in the New England situation if they had given the Interstate Commerce Commission some control over the stocks and bonds and the purchase of subsidiary lines. There has been always some question as to how far the United States Government can go in controlling internal affairs of corporations. There has been no attempt to do it.

Mr. WEBB. Here is just one public-corporation system, the railroads, controlled by a strong commission, which, nevertheless, is five or ten thousand complaints behind. Now, if you had a commission controlling 300 corporations, if the same proportion was maintained, when would they ever settle the complaints before them? It seems to me that Gabriel would blow his horn before they ever passed upon all of them.

Mr. MORGAN. We might meet that to some extent by limiting the number of corporations to be covered by this law.

Mr. VOLSTEAD. It is my impression that the railroad business is probably as expensive and requires as many adjustments as would be required with your bill. Now, do not understand me to be in favor of or expressing any opinion on the proposition of fixing the prices of goods, but I do believe this: That a commission could serve a very useful purpose in preventing discrimination and in regulating the issue of stocks and bonds, and so forth.

Mr. WEBB. Suppose under your bill that a corporation which comes within your definition or inclusion should divide itself up into a dozen smaller corporations and should locate each one in a different State and confine its sales to those States, would your bill reach them?

Mr. MORGAN. Well, we would have the Sherman antitrust law still in force. I do not propose that that law should be repealed.

Mr. NELSON. But it does virtually repeal it, because if you prevent price fixing——

Mr. MORGAN (interposing). Well, that is one objection. Some people think that if you attempt to fix prices it will mean a legalized corporation——

Mr. NELSON (interposing). The Sherman law forbids an agreement as to prices in restraint of trade, and if your commission passes upon them and says, "These are the prices which all shall charge," are not you virtually repealing that law?

Mr. MORGAN. No; I do not think my commission would go that far at all. My bill provides two things. Of course, it first provides that these prices shall be reasonable and just. Then, it not only gives the commission the power to decide whether a certain price is reasonable and just, but it gives the commission power to fix what is a just price. Now, it might be well, Mr. Chairman, in starting out, to do as

we did with the Interstate Commerce Commission. The bill originally creating that commission only gave the commission the power to decide whether a certain rate was just and reasonable or not, with no power to say what a just rate should be.

In other words, they had no power to fix rates. That power was not given to the Interstate Commerce Commission until 1910 in the Sixty-first Congress, when for the first time we gave the commission the power to fix what should be a reasonable rate. They were given the power to investigate on their own initiative and fix a rate, when prior to that time they did not have that power. Now, I think perhaps it might be well in starting out to give this commission the power to investigate, for instance, the price of steel rails, and then make an order or judgment or finding whether or not that is a reasonable rate for steel rails.

Mr. McCOY. How long would you have a decision remain in force?

Mr. MORGAN. Until reversed by the commission. It could be reversed at any time by the commission. Of course, we do not think we can fix the price of all articles, but it seems to me that these corporations which possess a large monopolistic control over the prices of products that go out and reach every home in the land should be regulated.

Mr. VOLSTEAD. Suppose they should sell their products to another corporation. Suppose one company manufactured rails and sold them to a consuming company?

Mr. MORGAN. Well, I say that I have only given an outline of my plan and there are a great many other things that are left to be worked out in detail. There are a great many little things to be added to the main proposition.

Mr. VOLSTEAD. I mean a manufacturing company and a selling company. That has been a common practice.

Mr. MORGAN. Yes, sir; I know that.

If after 23 years of experience it was found necessary to give this power to the Interstate Commerce Commission, to insure just and reasonable railway charges, why is it not both wise and safe to give this power to the commission that is to have jurisdiction over the so-called trusts?

I do not believe in extravagant and exaggerated expressions. I do not pose as a reformer. I am not an alarmist. I am not a radical. I am naturally conservative. But I believe in practical legislation. I believe in progress along constructive lines. We have had a revolution in the nature and character of our industrial concerns. Our business methods have changed.

Mr. NELSON. If it has taken 23 years for the Interstate Commerce Commission to get its powers and begin to operate, what would be the geological age in which your commission would begin to operate?

Mr. MORGAN. I will answer that by saying that the Interstate Commerce Commission was a new proposition when it was established. It was entirely in a new field of governmental action and it went on step by step until it responded to the demands of the growth of public sentiment, Congress enacted new laws, and no doubt in the future Congress will enact other laws relating to the commission.

The instrumentalities used in commerce and trade have changed. But our laws have not changed. Interstate business is largely under

control of the gigantic business concerns—great corporations—mammoth industrial organizations, wielding incomprehensible power in the business and commercial world. This power under proper control may be used for the glory of our country—or unrestrained it may be used for the expolitation of the public and oppression of the people.

Few people realize to what extent the corporations control the business of this country. Few persons fully comprehend how these great corporations now touch every avenue of trade, commerce, and business, receive tribute from every avocation, calling, and profession of life, and draw support and sustenance from every home and fireside in the land.

The corporations of the country, after deducting all the cost of labor, material, losses, and every other expense, made an annual net profit of $3,213,247,000. Industrial and manufacturing corporations alone make an annual net profit of $1,309,819,000. They employ 7,000,000 persons, and their annual products are worth $21,000,000,000. The corporations of the country, by a conservative estimate, own one-half of the wealth of the Nation. Probably not one-tenth of the people own any interest in these corporations. The corporation is a great business invention which has aided steam and electricity as mighty forces in the production of wealth and in the extension of commerce.

But the great business invention needs some improvements. We must invent some new attachments—that will make this modern machine, for the production of wealth, a more perfect and reliable invention for the equitable distribution of wealth.

Mr. McCoy. Have you looked into the question of how the stock of the Steel Corporation, for instance, or the Pennsylvania Railroad, the New Haven Railroad, the New York Central Railroad, or the other big railroads, is distributed? The statement is commonly made that the stocks and bonds are widely distributed and not concentrated.

Mr. Morgan. Yes; I understand they are widely distributed and I have tried to find some way whereby we could ascertain the number of persons actually interested who in any way own any stock or bonds.

Mr. McCoy. I believe that information is all available.

Mr. Morgan. Well, it might be for a few of the large corporations. For instance, I presume a great railway company could tell how many people own stock in the aggregate number, but as to the percentage I do not think there are any statistics.

Mr. McCoy. I know that you can get it somewhere in regard to some of the corporations. I know that because I have read a statement within 10 days and I have a notion that it is in one of those articles that Mr. Brandeis has been writing for Harper's Weekly.

Mr. Morgan. Well, I think those are general. Now, as to the number of people in the country interested. Take the 40,000,000 people who are on the farms. Forty per cent of the people are on the farms. Now, very few farmers own stock in corporations——

Mr. McCoy (interposing). Now, just a minute, if you will permit me right there. Do you not think that in dealing with that particular phase of the matter that it would be more satisfactory not to take 90,000,000, because, according to the statistics that would mean

about 14,000,000 male adults. Would it not be better to deal with the male adults in the country, because women and children are not apt to and are not expected to own these stocks and bonds?

Mr. MORGAN. Well, you would get the same results. Suppose there are something like 6,000,000.

Mr. MCCOY. Yes, sir.

Mr. MORGAN. Now, you take the industrial corporations and manufacturing corporations. They employ 7,000,000 persons. Now, those are supposed to be adults old enough to work. I do not know what per cent of those 7,000,000 persons have any interest in large corporations and I would like to know how I could find out. I do not suppose more than 1 in 10 of those wage earners owns any stocks. There are about 1,500,000 persons employed by the railroads. I do not know, but I just presume that there is not 1 out of 10 of the railroad men that own any of the stock. I would like to get at the figures.

Mr. MCCOY. They are wise men: they do not want to take the risk.

Mr. MORGAN. Now, here are corporations with ninety-two billions of stocks and bonds. If the great corporations own $92,000,000,000 worth of stocks and bonds, that must represent half the wealth of this country. Now, those corporations have a net income of over $3.000.000,000 a year. The report of the Commissioner of Internal Revenue shows the profits of these corporations, and upon that $92,000,000,000 they have a net profit of nearly 4 per cent, which would indicate that after all it comes to very nearly representing that much wealth. So that a large amount of wealth is in the hands of corporations and it is centered in large corporations with the wonderful power that these corporations have of drawing something from every home in the land. You can not get out of that.

It seems to me that all of these things which I have mentioned would justify us in declaring that certain of these corporations that have attained a certain power or a certain size ought to be controlled. There are a number of industrial concerns over which we ought to exercise some control in the matter of the price at which they sell their products. Now, that $5,000,000 limitation in the bill is just arbitrary, and you can make it $10,000,000 if you want to. I think it is a reflection upon us that we permit these corporations to go on with this immense power, and I am not extravagant in my belief, but I believe the time has come when the National Government should put a limit upon that power or else destroy the corporations. We all know that we are not going to enact legislation that is going to wipe out these corporations immediately. It will only take a long series of years. But we can work it out. I do not see any reason why we could not declare that prices of certain articles sold by certain corporations shall be reasonable and just, and then leave the power in the hands of the Government to say that their price is just.

Mr. WEBB. Would it not be much simpler to fix a limit of the capital stock of a corporation doing business than to go into the matter of fixing prices?

Mr. MORGAN. Well, there are a great many people who believe that these great corporations are useful as instrumentalities to extend our Government business throughout the world and that they are

really beneficial to the wage class and give them better employment, better wages, and better conditions under which to labor. If they are really economical propositions, and I am not discussing that proposition, and if you limit the capital then you will say we are only going to do business on a small scale.

Mr. WEBB. Your law is aimed at big corporations, those whose capital stock runs up into the millions?

Mr. MORGAN. Yes; because we believe that the small corporation can not exercise a dangerous influence upon the people.

Mr. WEBB. Then you would break up a large corporation by limiting the stock? You would eliminate the bad and keep the good classes?

Mr. MORGAN. Yes, sir; and we will get what benefit we can out of the large industrial concerns, and take away the sting—take away their power to do any injury to the great masses of the people.

Mr. MCCOY. One of the complaints about the price fixing and adjustment, too, I think, has been that the Standard Oil Co., for instance, in order to drive competitors out of a given territory will put their price so low that the competitor can not remain in a district.

Mr. MORGAN. I would declare a thing like that unlawful. It is unlawful to sell in one locality at one price and in another locality at another price.

Mr. MCCOY. Does that come within your bill?

Mr. MORGAN. Yes, sir; because my bill declares that all these plans, devices, and contrivances for the extension of their business shall be fair and just and the commission shall decide whether a certain practice is fair or unfair or just or unjust, and if it is unjust or unfair they will prohibit it.

Mr. WEBB. Would you put a universal one price on coal, for instance?

Mr. MORGAN. I certainly would not. For instance, you take the price at which the West Virginia coal fields would sell their coal. That would be a proposition like a certain railroad that the Interstate Commerce Commission might be considering.

I have no conception that they shall say that coal shall sell at a certain price. Every man who brings his case up before the commission will say, "Our labor cost is so much, our expenses are so much, we have made so much profit," and then the commission shall decide whether it is reasonable or just.

Mr. CAREW. Do you not see that there is a difference between fixing transportation rates and fixing rates on certain shifting conditions as must relate to matters of trade? Conditions shift so much more rapidly there than in transportation.

Mr. MORGAN. Of course there is a difference; but, for instance, take the question of steel rails. I think it has been said that for 10 or 12 years the price has been $28 a ton.

Mr. NELSON. There is one difficulty that I want to get right on. The Steel Trust is well equipped, but there are independent companies. Would you fix the price on a commodity so as to satisfy the Steel Trust with its equipment and make it profitable and reasonable to them, or would you consider the price charged by some poor devil of an independent who was struggling along?

Mr. MORGAN. If the Steel Corporation can make more profit than a small concern I do not think that the commission would put in a

price there that would wipe out the small concerns. They would have to take that into consideration, and public sentiment would not demand that they should do otherwise. This question of reasonable price is, after all, a matter with the conscience of the Nation as to what is fair and just.

Mr. NELSON. Now, you use the expression "fair and just." Would anybody know what fair and just meant? Would not that leave it up to anybody's discretion?

Mr. MORGAN. I think so.

Mr. NELSON. Would not that leave a tremendous range of discretion?

Mr. MORGAN. Is not that the test under which the Interstate Commerce Commission has decided every case and under which the highest courts of this land have decided these great railroad rate cases?

Mr. NELSON. But even they also said they could not do that unless they knew the valuation of the railroads.

Mr. MORGAN. Yes, sir.

Mr. NELSON. And would not you then have to value all these combinations?

Mr. MORGAN. You would have to value them, I presume, but you would apply the same principle, you would need the same facts and work it out on the same basis as you would in the case of a railroad corporation. Yes, it has capital, it has labor, it has expenses of all kinds the same as the Steel Trust has.

Mr. NELSON. Did you read the statement of the coal operator, I think his name was Vinson, before the Interstate Commerce Commission?

Mr. MORGAN. Yes, sir.

Mr. NELSON. Do you not recall that he advised a commission for the coal fields alone?

Mr. MORGAN. Yes, sir.

Mr. NELSON. And he said it would keep that commission busy to fix prices?

Mr. MORGAN. Yes, sir; in West Virginia.

Mr. NELSON. Now, how in the world could you expect the commission to take up the Tobacco Trust, the Sugar Trust, the Oil Trust, the Steel Trust, and all the others and decide the prices?

Mr. MORGAN. That is a matter of organization. Now you take the steel corporation. That is a mammoth concern with $1,400,000,000 capital, representing more wealth than the 1,750,000 people of Oklahoma. They have an immense business and it is all organized until it is run almost to perfection. We can have the commission and organize the same kind of work, and the work would be divided and one class of men would do one class of work and there would be no difficulty at all, no duplication of work, because after all there are not many of these large corporations.

Mr. PATERSON. The steel corporation produces steel rails at $28 a ton and the independent companies produce them for $30 a ton. Would you fix the rate at $30 a ton or $28 a ton; and if so, do you think it would be fair to the independents?

Mr. MORGAN. Of course, there could not be but one price. The commission would probably not be justified in fixing a price for the trust that would not be fair to the independents. That would apply to large corporations, too; they would not fix such a price that they

would have to go out of business, although in the course of time some small corporation might have to go out of business for the public good. I do not know how far that would go. Now, it is a fact that the United States Steel Corporation can manufacture steel at $2 or $3 or $4 per ton cheaper than the other companies. Then the one great force of that company is to fix the price of iron and steel products which go into every home in the land in one form or another. They have that power to tax the people. It is just another form of drawing the sustenance and products of labor from the people, and no such power should be in any corporation or artificial person if it is to be left unrestricted.

Mr. PATERSON. What we want is a remedy.

Mr. MORGAN. I think I have done my best to find a remedy.

Mr. PATERSON. Where is your remedy? If that great steel corporation can produce steel cheaper than any other company how are you going to have any competition?

Mr. MORGAN. I would, of course, give this commission the power to take up the question as to whether their prices were reasonable, and if they were making an unreasonable profit I think it ought to be brought down.

Mr. PATERSON. Well, you will admit now that if the small competitor can not compete with the steel corporation that it would be put out of business.

Mr. MORGAN. Well, you know that free competition results finally in a monopoly, and if the steel corporation was turned loose it would be an absolute monopoly in a few years, because it has the power to drive out every competitor.

Mr. WEBB. If your commission would fix one price for all the steel products in the country it would not be sixty days before the steel corporation would be without a competitor in the field.

Mr. MORGAN. Do we not recognize the fact that the prices of steel and iron are higher than they would be if we reduced to some extent the price charged by the trust, because if the probabilities are that these minor corporations are making more profit than they should——

Mr. WEBB (interposing). But you state that the Steel Trust can produce cheaper iron and steel. Suppose you cut the price 20 per cent. You have to cut it on the independent corporations to the same extent and they can not live nearly as well as the larger corporations under the cut price.

Mr. MORGAN. If you reduce the profit of the independent companies you also reduce the profit of the larger corporations.

Mr. WEBB. But you must have a standard price.

Mr. MORGAN. Yes, sir.

Mr. WEBB. The large corporation being better able to stand the cut, the big fish have the advantage in price over all the other fish in the water.

Mr. MORGAN. Yes, sir.

Mr. NELSON. I notice you have studied the subject a good deal and undoubtedly there are a great many other men who believe that ultimately we must fix the price.

Mr. PATERSON. That is the way with me.

Mr. NELSON. Now, one objection to that is this: If you fix a maximum price it must be 6 per cent or 8 per cent?

Mr. MORGAN. Well, assume something like that.

Mr. NELSON. Now, when a monopoly has a fixed price of 6 per cent or 8 per cent, what inducement is there to progress in the business?

Mr. MORGAN. Well, of course, from an economic standpoint, one of the objections made is that any restriction of price of individual business will tend to retard and discourage individual initiative and individual effort, and when the profits of a great corporation are limited they have no inducement to extend their business.

Mr. NELSON. Why should they? They have their fixed earnings and if they go into a new departure which necessitates an outlay of money they still get their 6 per cent or 8 per cent just the same.

Mr. MORGAN. Yes; but would it not be better for the people to have something of that kind than to be in a position where there are corporations that have an undue power to tax them? However, that is not the question. That may be met in some other way.

Mr. PATERSON. Inventions often reduce prices?

Mr. MORGAN. Well, they are supposed to in the long run, although some inventions have raised the prices or kept them up.

Mr. NELSON. We have argued that these great special interests should keep out of politics; but if some one is to fix prices, and their business, their dividends, their very life depends upon some public official, would not that drive them into politics to protect themselves?

Mr. MORGAN. Well, there is something in that; but we have assumed control of the transportation corporations, the public-service corporations, the public-utilities corporations, and of the banking institutions, and now we are about to pass a great banking bill with far-reaching effect. Now, some people argue that that is putting the banks into politics. Perhaps there is something in that, too; but as we have got to put power somewhere, we ought not to allow an artificial organization of men and capital to attain a power which they can exercise independently to the detriment of the great masses of the people. It seems to me that we must either absolutely wipe out these corporations and keep them within limited size and power or we must exercise governmental control over them. There is no more danger in this kind of control than there is in controlling the transportation companies. The Post Office Department has recommended that we assume control and operation of telegraph and telephone companies. Now, the probabilities are that in modern times and under modern conditions——

Mr. NELSON (interposing). Just a minute. You ultimately desire competitive conditions?

Mr. MORGAN. Yes, sir.

Mr. NELSON. And your bill is only a temporary method of reaching competition and breaking up these corporations?

Mr. MORGAN. Yes, sir.

Mr. NELSON. Or do you stand for regulative monopoly?

Mr. MORGAN. No, sir; I do not believe in monopoly.

Mr. NELSON. I mean regulated monopoly.

Mr. MORGAN. I do not believe in regulating monopoly. I do not believe in any complete monopoly. Now, we understand that there is every degree of monopoly existing. We say monopoly, but perhaps we have no real perfect or complete monopoly existing.

Mr. NELSON. The Aluminum Trust is a monopoly.

Mr. MORGAN. I do not know that.

Mr. VOLSTEAD. You mean in connection with iron?

Mr. NELSON. I mean in its own field.

Mr. MORGAN. It is a question of real monopoly. We have certain corporations which possess such monopolistic power that it is unsafe to permit them to go on unrestricted.

Mr. NELSON. But you want to keep the Sherman law?

Mr. MORGAN. Yes, sir.

Mr. NELSON. That indicates that you want competition?

Mr. MORGAN. Yes, sir; I do not think that is inconsistent. We have not destroyed all competition in the railroads.

Mr. FITZHENRY. Your bill is very largely administrative and does not suggest any economy.

Mr. MORGAN. Except probably the fixing of prices.

Mr. VOLSTEAD. I think one of the most important points is in regard to preventing unfair discrimination among localities. Of course, the commission would have the power to carry that out.

Mr. FITZHENRY. That is an administrative feature of the bill?

Mr. MORGAN. No; I declare that these practices must be fair and just and reasonable, which is not the case now, only so far as the Sherman antitrust law prohibits combinations in restraint of trade. There are thousands of other things that they can do and are doing now which are not prohibited. Now, I think we ought to declare by a general law, just as we have in regard to railways, that these unreasonable practices shall not be permitted, and leave it to the commission to decide whether it is fair or not. We declared that there should be no rebates in the railroads, and we also declared against unjust discrimination. The commission could find that a certain act was an unjust discrimination even though it be not prohibited by law.

Now, Mr. Chairman, that is all I have to say, and I desire to thank the committee for its courtesy for granting me this hearing.

The CHAIRMAN. We are much obliged to you, Mr. Morgan.

(Thereupon the committee adjourned.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 29, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. This is the day which was fixed by the committee for the beginning of hearings on the antitrust measures, and Representative Stanley was invited to be here to deliver his views on the subject and in behalf of the various bills which he has introduced. Representative Henry, of Texas, was also invited to be present, but since he is unable to be here to-day, he has sent the chairman a note, which will be incorporated in the record at this point.

(The letter referred to is as follows:)

HOUSE OF REPRESENTATIVES, COMMITTEE ON RULES,
Washington, D. C., January 29, 1914.

Hon. H. D. CLAYTON,
Chairman Committee on the Judiciary,
House of Representatives.

MY DEAR MR. CLAYTON: Allow me to thank you for the courteous invitation extended to me to present my views on the needed legislation touching the antitrust problems.

It would give me great pleasure to appear to-day and enlarge upon the features embraced in the bill introduced by me some weeks ago, but I am unavoidably taken out of the city for a day or so and will not have the privilege of addressing the committee as suggested. I am inclosing copy of an address delivered by me before the South Carolina Bar Association on January 24, 1913, which I beg leave to call to the attention of the committee. This address embraces my views rather fully on the subject, and I do not know that I could add much to what I said on that occasion that would be of interest at this time in regard to the pending bills. It seems to me that my remarks on that occasion are in almost complete accord with the bills prepared by yourself and associates during the present month.

Very truly, yours,

R. L. HENRY.

(In accordance with the request of Mr. Henry, his address is here printed:)

ADDRESS OF HON. ROBERT LEE HENRY, OF TEXAS, BEFORE THE SOUTH CAROLINA BAR ASSOCIATION, ON JANUARY 24, 1913.

PENDING PROBLEMS IN FEDERAL LEGISLATION—ARGUMENT AGAINST INTERLOCKING DIRECTORATES AND VOTING TRUSTS AND FOR PROPER REGULATION OF INTERSTATE CORPORATIONS.

Mr. President and members of the South Carolina Bar Association, the invitation to address this association is one of the greatest honors that has ever come to me during my public career, and I shall endeavor to justify your courtesies by uttering no unworthy word here to-night. For the first time coming to a State whose history is replete with patriotic deeds, statesmanship, and the fame of distinguished lawyers, I am thrilled with the obligation of the hour and am not unmindful of the duties resting upon our honorable profession. In the course of my remarks there shall be no tinge of rancorous partisanship, but the times demand that I speak in candid and courageous fashion while treating the pending problems in Federal legislation, which is my theme for the evening.

Never in our history did the solution of public questions call for greater patriotism and braver speech than now. Clinging to the Constitution as fashioned and handed down by South Carolina's immortal men, in conjunction with those of her sister States, I shall deal with the great Federal issues now demanding solution in no veneered and dubious language. With that immortal instrument as my chart and guide I shall speak as one who loves his country and her institutions.

OUR ANTITRUST ACT.

Monopoly first began to prey upon the people in the time of Queen Elizabeth. Privileges of monopoly were granted by her to courtiers and servants till they became intolerable and were terminated by the wrath of the people in the enactment of the "statute of monopolies" in 1624. Our antitrust act is but the outgrowth of the spirit against monopolies which secured the passage of those ancient laws. Twenty-five years ago gigantic monopolies and conspiracies against trade in alarming proportions began to infest this country. Such types as the Standard Oil Trust, the Sugar Trust, and the Beef Trust raised their heads and began to gnaw at the vitals of commerce and trade. The people demanded their utter destruction, with no spirit looking to moderation of their ravages. In obedience to that demand, Congress passed what is known as the Sherman antitrust law, and on July 2, 1890, it was approved by Benjamin Harrison, the President.

THE SHERMAN ACT.

It has been construed in more than a hundred decisions, and the Supreme Court has held its provisions clearly constitutional. It has never been amended and should not be repealed. It can be supplemented and bettered. Every citizen should hug it to his bosom as a Magna Charta among our Federal statutes. This act came into being after months of profound study and by practically unanimous consent in the Congress of the United States. It is the Nation's will, and court and citizen should respect and uphold it.

Its origin and history are most interesting. The principles embraced in its provisions should be accredited to Senator Sherman, whatever critics may claim to the contrary, for on December 4, 1889, he introduced Senate bill No. 1, entitled "A bill to declare unlawful trusts and combinations in restraint of trade and production."

This was the beginning of the struggle against monopoly in Federal legislation, out of which the final bill emerged after various processes of amendment. History should record the truth and set this legislation down to the credit of the Ohio statesman. And patriots of whatever persuasion should preserve and perfect it to meet the emergencies of the hour.

The original Sherman bill, in section 3, denounced violations of its provisions as a felony and provided for "imprisonment in the penitentiary for a term of not more than five years, or both * * * fine and imprisonment, in the discretion of the court." We are not to-day more extreme than Senator Sherman, and yet the trusts and monopolies have increased a thousandfold in numbers and enormity of greed since his day.

On January 14, 1890, Senator Sherman reported his bill to the Senate, and it was there considered from week to week. On March 21, 1890, he reported from the Committee on Finance a substitute for his original bill. Whereupon Senator Reagan, of Texas, offered a substitute for the Senate committee's substitute. His bill set out at great length the acts constituting a trust and conspiracy against trade, and bristled with luminous and efficient definition. It, too, denounced violations of its provisions as a felony, and in certain and comprehensive language provided penalties. The pending amendments were considered on various occasions in the Senate, and on March 25, 1890, by a vote of 30 yeas to 12 nays, the Reagan substitute was added to the Sherman bill. On March 27, 1890, the Senate again resumed consideration of the bill, and upon motion of Senator Walthall, of Mississippi, the entire subject was referred to the Committee on the Judiciary.

THE SUBSTITUTE.

On the 2d day of April, 1890, Senator Edmunds reported a substitute of eight sections for the original bill and amendments. That substitute was and is the identical Sherman law of to-day. No matter what Senator wrote this or that language in the final draft, it was, after all, the culmination of the purpose and genius of Senator Sherman, whose inspiration was to reach and strike down monopolistic spirit abroad in the land. In multifarious forms the Senate considered the substitute reported from the Judiciary Committee. It passed that body and then went to the House. It there passed with amendments and went through two conferences, which finally struck out the amendments after debate clearly revealed that the act was understood to reach transportation companies doing an interstate business, and prohibited "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations," whether "reasonable" or "unreasonable." The conference report was agreed to, and the bill passed in exact form as reported by the Senate Judiciary Committee. By unanimous vote of 240 ayes the House passed the bill on June 20, 1890.

In closing the debate in the House, Mr. Stewart, of Vermont, said:

"The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress on this subject under the Constitution of the United States."

Inflexible rules of reason and logic inevitably lead to the conclusion that its very first section prohibits "every combination in restraint of interstate or international commerce."

FIGHT BY THE TRUSTS.

The law having passed and the people vindicated in their demands for such legislation, the struggle on the part of the trusts to undo the achievement began. The first conflict came in the Knight case, which was lost to the Government on account of bad pleading and mismanagement on the part of the governmental officers. Emboldened by this accidental success, the trusts increased their defiance of the national will and prepared for further conflict in attacking the law.

JUSTICE PECKHAM'S DECISION.

Next came the case of the United States against Freight Association, decided by the Supreme Court in 1896. Justice Peckham, in a luminous decision, upheld the constitutionality of the law, which was vigorously assailed by trusts and monopolies. He said:

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language

and no exceptions or limitations can be added without placing in the act that which has been omitted by Congress."

He said further:

"In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government. * * * This we can not and ought not to do."

And in patriotic language he adds:

"If the act ought to be read as contended for by defendants, Congress is the body to amend it and not the court by a process of judicial legislation wholly unjustified."

The majority of the court agreed and upheld the law as written by Congress. Justice White registered his dissent stoutly, contending that the word "unreasonable" should be interpolated immediately before the word "restraint." He courageously took his stand in 1896, and the opinion speaks for itself.

Not content with this defeat, the trusts and monopolies renewed the attack for the purpose of dismembering the law and thwarting the will of the people. In 1898 the Supreme Court decided the case of the United States against the Joint Traffic Association. Again, Justice Peckham delivering the opinion of the court, the constitutionality and validity of the statute were sustained. In emphatic language the court reaffirmed the decision in the case of the Trans-Missouri Freight Association and reasserted that the word "unreasonable" can not and must not be supplied before the word "restraint" in the act.

WHAT THE COURT SAID.

The court said:

"This court with care and deliberation and also with a full appreciation of their importance again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the same arguments are employed, and the court is again asked to recant its former opinion and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri case. * * * As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed."

And so in 1898 Justice White again dissented. The decisions were reaffirmed in numerous instances and became the settled rule of conduct. In 1907 the court again reaffirmed the decision in the Joint Traffic and Freight Association cases and said, in the case of the Shawnee Compress Co. *v.* Anderson (209 U. S. Rep.):

"It has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law."

And with emphasis the Supreme Court said in the Northern Securities case:

"All contracts of that character, whether they are reasonable or unreasonable, are prohibited."

THE WORD "UNREASONABLE."

The trusts and monopolies meantime became disheartened at the action of the courts and subtly approached another forum. They came to Congress and caused a bill to be introduced supplying the word "unreasonable" where they had failed to insert it by judicial amendment. This bill was introduced at the second session of the Sixtieth Congress, in 1909. In the face of the decision of the courts, the bill proposed "that no prosecutions under the first six sections should be maintained for past offenses unless the contract or combination be in 'unreasonable' restraint of trade or commerce." The Senate Committee on the Judiciary, reporting against this proposed amendment, as well as others equally untenable, said:

"To amend the antitrust act as suggested by this bill would be to entirely emasculate it and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie, and civil remedies would labor under the greatest doubt and uncertainty. * * * To destroy or undermine it at the present juncture, when combinations are on the increase and appear to be as oblivious as ever to the rights of the public, would be a calamity."

Thus appealing to the courts and Congress to amend the act by writing the word "unreasonable" therein, dismal defeat in every effort met the emissaries of the trusts and monopolies.

From the first decision on this statute to the oil and tobacco cases, the courts have strongly held that the mere tendency to stifle competition brought the acts within the prohibition of the law, regardless of the fact whether such acts were reasonable or unreasonable. All reasonable citizens agree that ordinary purchases and sales, formation of partnerships and honest corporate organizations do not violate the Sherma

Act, although by incidental effect that may restrain as between parties interstate or foreign commerce. Monopoly is not constituted by size alone. The act is not violated where persons or corporations attain dominancy in business by normal and honest methods of enterprise. Such acts and agreements lack the elements of conspiracies constituting monopoly, combination, and intent to destroy competition and restrain trade.

WHAT "AGREEMENT" MEANS.

The Senate committee meant and the oil and tobacco cases mean, to state it in honest fashion, that the injection into the acts of whether an agreement or combination is reasonable or unreasonable renders it, as a criminal or penal statute, indefinite and uncertain, and hence nugatory and void, and would be tantamount to repealing that part of the act. For there is no older and better settled principle of the law than the rule that there can be no crime unless the act is one which the party must know in advance is criminal. It must be definite and certain. Since the Supreme Court has amended the act by writing the word "unreasonable" therein, it may be well feared that the criminal parts can not be enforced.

The defense of reasonable restraint will be made everywhere, and there are certain to be as many rules of what is reasonable as there are judicial forums in the country. The cases against the Standard Oil Trust and the Tobacco Trust had reached the Supreme Court in 1910. The trusts and monopolies rallied for one more effort in that forum and trained their guns against the provisions of the Sherman law. They made demand that the national will and legislative policy be thwarted by judicial amendment and that by a "modern rule of reason" only unreasonable trusts and monopolies be prohibited by law. Their advocates divided trusts and monopolies into "good" and "bad" and said the good ones are reasonable and only the bad ones can be unreasonable. Another battle was fought in the field of jurisprudence, and, with a changed personnel, the Supreme Court yielded to monopoly where thrice before they had refused to surrender. And in the year 1911, with a largely changed Supreme Court, the host of trusts and monopoly won a triumphant victory.

Before proceeding to state my views and analysis of the oil and tobacco cases, permit me to add that no man has a higher regard for the judiciary than that entertained by me. No patriotic citizen can afford to arouse prejudice against the courts. In the last analysis they are the palladium of our rights and liberties. Nor, on the other hand, should any reasonable man make a fetish of the judicial office. Judges are not above public opinion and criticism. Hence, fundamentally, I make no difference between the judicial and other offices, for they are all but creatures of the people's will and clothed with powers to be executed as trustees in behalf of the public under the Constitution and laws.

In the year 1911, after 15 years of weary waiting, Chief Justice White had his way and by a bare majority of one planted the decision of the court where he had stood in his dissenting opinion in 1896. In plain language he inserted the word "unreasonable" before the word "restraint," as he strongly contended was appropriate that year. In this judicial struggle it suits me to stand where the court stood in 1896, and where Justice Harlan took his stand in 1911. After exhaustive and patient study, my mind leads me to the inevitable conclusion that I must concur in the position assumed by that lamented justice, who in intellect ranks with America's greatest jurists.

WHAT JUSTICE HARLAN SAID.

In order that I may not transcend the proprieties of the occasion, permit me to reiterate what the public heard this eminent jurist say in the debate occurring in the Supreme Court the day the opinions were handed down. He said:

"With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions."

Further along he said of the trusts and monopolies:

"They at once set up the baseless claim that the decision of 1896 disturbed the 'business interests of the country' and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to reasonable restraints."

With irrefragible logic he said:

"The only answer which in frankness can be given to this question is that the court intends to decide that its deliberate judgment 15 years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the 'rule of reason.' * * * I have the authority of this court for saying that such a course of proceedings on its part would be 'judicial legislation.'"

Then he adds:

"I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded as otherwise than sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by judicial legislation, read words into the antitrust act not put there by Congress."

Then, in patriotic warning, he threw out this statement, which is confirmed by my career as a representative of the people at Washington:

"After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs. I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction."

WHAT ROOSEVELT SAID.

The opinion of the court in the Tobacco case reaffirmed the victory achieved in the Oil case. It added nothing new in the application of the law. Indicating the view taken by the country of these opinions, allow me to quote a flamboyant announcement from a distinguished ex-President. In the Outlook he said:

"It is contended that in these recent decisions the Supreme Court legislated. So it did, and it had to, because Congress had signally failed to do its duty by legislating. * * * Where the legislative body persistently leaves open a field which it is absolutely imperative, from the public standpoint, to fill, then no possible blame attached to the official or officials who step in, because they have to, and who then do the needed work in the interest of the people. The blame in such cases lies with the body which has been derelict and not with the body which reluctantly makes good the dereliction."

Hamilton in his wildest dreams of absolutism never advanced the doctrine that the Supreme Court should legislate. Aye, more! This distinguished ex-President urges that not only shall the Supreme Court legislate where Congress fails to act or acts as he would not approve, but that executive officers and others officials shall make good the needed legislation by their action and usurpation. Away with such doctrine! Again I say, let us hug to our bosoms the Constitution of our fathers. Let the three departments occupy their spheres. Executive officers have no rights except those of executive character. Legislative officers have no prerogatives of power except those pertaining to legislation. Judicial officers have no rightful domain for exercise of their powers except in the judicial field. When they transcend that they should be scourged back by public opinion and criticism to their constitutional limitations, and the people invariably, with righteous indignation, should hold all officers within their corporate spheres. Any other view will wreck this Government, and we owe it to ourselves here and elsewhere to assert our conception of duty in courageous and candid action. This same gentleman in his article divides trusts and monopolies into good and bad, scouts the idea of a return to wholesome laws of competition, and proposes in lieu thereof the combination of good trusts and monopolies and the supervision of all by a small governmental commission to regulate them and give the good ones certain freedom and license. These doctrines are vicious and against the genius of our institutions and civilization. Our duty is in the other direction.

We must, to preserve our liberties, return to the ancient doctrine of competition and decree that combinations must be destroyed and private monopoly perish from the earth. Never should we assert that these vast monopolies and trusts may seek refuge under the wings of a small governmental commission of men with thousands of cases piled before them in every conceivable form of litigation, where private litigants are too poor to assert their rights.

If it be said that the courts should be above just criticism and that we should not raise our voices as sovereigns against them, let me remind you that they have not always been regarded as inviolate by the American people.

THE DRED SCOTT CASE.

More than 50 years ago Chief Justice Taney rendered a decision that provoked criticism and drew that great tribunal into the maelstrom of violent public discussion. To illustrate the feeling then engendered, let me remind you of some things said and done at that time. Mr. Blaine says:

"The aversion with which the extreme antislavery men regarded Chief Justice Taney was strikingly exhibited during the session of Congress following his death. The customary mark of respect in providing a marble bust of the deceased to be placed in the Supreme Court room was ordered by the House without comment or objection. In the Senate * * * the proposition to pay respect to the memory of the judge who had pronounced the Dred Scott decision was at once savagely attacked by Mr. Sumner. Mr. Sumner said: 'Taney would be hooted down the passages of history and that an emancipated country would fix upon his name the stigma that it deserved. He had administered justice wickedly, had degraded the judiciary, and degraded the age.'

"Mr. Sumner's protest was vigorously seconded by Mr. Hale, of New Hampshire, and Mr. Wade, of Ohio. The former said that a monument to Taney 'would give the lie to all that had been said by the friends of justice, liberty, and downtrodden humanity' respecting the iniquity of the Dred Scott decision. Mr. Wade avowed his belief that the 'Dred Scott case was got up to give judicial sanction to the enormous iniquity that prevailed in every branch of our Government at that period.'

"He insisted that the people of Ohio, whose opinions he professed to represent, 'would pay $2,000 to hang the late Chief Justice in effigy rather than $1,000 for a bust to commemorate his merits.'

"Mr. Sumner concluded the debate and said that in listening to the Senator from Maryland he was 'reminded of a character known to the Roman Church who always figured at the canonization of a saint as the devil's advocate.' He added that if he could help it 'Taney should never be recognized as a saint by any vote of Congress.' A vote was therefore abandoned on the 23d of February, 1865.

"Nine years after these proceedings, in January, 1874, the name of another Chief Justice, who had died during the recess, came before Congress for honor and commemoration. All the Senators who had spoken in the previous debate were gone, except Mr. Sumner, who had meanwhile been chosen for his fourth term, and Mr. Wilson, who had been elevated to the Vice Presidency. The bill was passed without debate and with the unanimous consent of the Senate."

All these harsh things were said, although the decision was absolutely correct and has never been overruled.

RECALL OF JUDGES.

With proper regard and respect for the judiciary, I must assert that those officials are more responsible for the specter of the recall of judges stalking through the country than any other influence in the Republic. There would be lack of candor in my remarks if I failed to declare that, in my humble judgment, the action of the Supreme Court in nullifying long and well-established adjudications in the income-tax decision and the antitrust cases is almost entirely responsible for stirring up the living issue of recall. If the court had not uprooted their former decision and thereby defied the national will as expressed in congressional enactment and changed by judicial construction and amendment plain words and acts, recall sentiment would not be so rife this day. It is not fair to charge that what some choose to call the rabble, the masses, have altogether aroused this sentiment. I repel the impeachment and defend the right of the people to discuss and seek solution of these problems. Without here discussing the necessity and desirability of recalling judges, long since I have concluded that there should be a speedier and more effective remedy than the cumbersome process of impeachment where impeachment will not lie.

REMOVAL BY ADDRESS.

There should be the cumulative remedy of "removal by address" for nonimpeachable cases by a majority vote of the House and Senate, as is done in England and many States of the Union. This would go far toward putting the Government more directly in the hands of the people and vesting sovereign final action where it appropriately belongs. This method of dealing with judges unfit for office has evolved an almost perfect judiciary system in England, where the judges rank with the world's greatest, and has worked with magic effect in States where it has been adopted and whose judges are unrivaled by the other Commonwealths. It is therefore commended as a supplementary remedy for the ponderous method of impeachment.

REMEDY FOR THE DEFECTS.

Having thus briefly outlined the history of our Federal antitrust statute and judicial construction touching the same, permit me to point out some apparent defects challenging attention and remedy.

First, it is essential to safeguarding the people's rights that the Sherman law should be amended or supplemented so that the "rule of reason" written therein by the Supreme Court shall be entirely eliminated and place the meaning of the statute where the framers intended it should be. The language should be written in such plain and unequivocal fashion that courts will never hereafter construe the word "unreasonable" into the wording thereof, either before the word "restraint" or anywhere else in the act, so that he who runs may read therein that all restraints of trade and commerce by trusts and monopolies, whether reasonable or unreasonable, shall be forever prohibited.

Congress should proceed to speedily repeal the judicial amendment which has maimed this important law. The act should be retained with all its present efficiency without the slightest impairment. Contracts and combinations now prohibited by it should so continue under its prohibitions, but there should be further accurate definitions so as to define with the utmost precision acts constituting a trust, monopoly, and combination. There should be no doubt and uncertainty left either in the minds of the courts or the offenders, and those engaged in business should be apprised of the exact limits of their activities under the law.

PROVIDE ADEQUATE PENALTIES.

And then adequate penalties should be provided and the stigma of a felony placed upon violators, as first proposed by Sherman, Reagan, George, Walthall, Vest, and others. The penitentiary should be designated as the place of abode for a term of years, ranging from 2 to 10 years, for those criminals who will not respect the majesty of this statute. We might not convict all offenders, but we would succeed in numerous cases and deter many from violating the law.

When the first act was passed there were not many trusts in existence. Amongst the larger ones were the Beef Trust, the Oil Trust, and the Coal Trust. Since that day they have grown until their capital stock amounts to billions and billions of dollars. With the Dingley and the Payne-Aldrich High Tariff Acts constituting a wall of protection around the Republic, our country has become a veritable breeding ground, seething and reeking with monopoly and combinations in restraint of legitimate trade and commerce. Two or three bankers in New York City have accumulated vast amounts of wealth and have taken under their wings the great railroad and industrial corporations of the country and are manipulating their finances. They run the daily balance in those banks to hundreds of millions of dollars. Four or five years ago these corporations and trusts deposited their funds in the localities where domiciled. But now they are compelled to pile up their deposits in these banks, under whose complete dominion they are now conducting their affairs. So manifest is this concentration and abuse that more than two years ago, before the startling developments were made before the Pujo Money Trust Committee, an eminent American statesman, Woodrow Wilson, said:

"The great monopoly in this country is the money monopoly. Our system of credit is concentrated. The growth of the Nation, therefore, and all our activities are in the hands of a few men, who, even if their action be honest and intended for the public interest, are necessarily concentrated upon the great undertaking in which their money is involved, and who necessarily, by very reason of their limitations, chill and check and destroy genuine economic freedom. This is the greatest question of all, and to this statesmen must adjust themselves with an earnest determination to serve the long future and the true liberties of men."

These were brave words, and we should proceed to take them as their meaning implies.

TESTIMONY OF MORGAN.

J. Pierpont Morgan and his partner, George F. Baker, admitted before a committee in Washington that they dominated and controlled practically all of the great interstate railways and industrial corporations and trusts through interlocking directorates, voting trusts, and various financial conspiracies. They have solemnly sworn before the congressional committee at Washington that in the aggregate they hold 385 directorates in 41 banks and trust companies, having total resources of $3,832,000,000 and total deposits of $2,834,000,000; 50 directorships in 11 insurance companies, having total assets of $2,646,000,000; 155 directorships in 31 railroad systems, having a total capitalization of $12,193,000,000 and a total mileage of 163,200; 6 directorships in 2 express companies and 4 directorships in 1 steamship company, with a combined capital of $245,000,000 and gross income of $97,000,000; 98 directorships in 28 producing and trading corporations, having a total capitalization of

$3,583,000,000 and total gross annual earnings in excess of $1,145,000,000; and 48 directorships in 19 public-utility corporations having a total capitalization of $2,826,000,000 and total gross annual earnings in excess of $428,000,000; in all, 746 directorships in 134 corporations, having total resources or capitalization of $25,325,000,000. To put it in perhaps more graphic form, it has been established before the Pujo committee, and Morgan, Baker, and their allies forced to there admit, that a phase of their conspiracy and Money Trust may be fairly put as follows:

THE GREAT SEVEN.

The following seven institutions have total resources of $1,398,000,000: J. P. Morgan & Co. (and Drexel & Co.), deposits, $163,000,000; Guaranty Trust Co., $292,000,000; Bankers' Trust Co., $205,000,000; First National Bank, $149,000,000; National City Bank, $247,000,000; Chase National Bank, $125,000,000; National Bank of Commerce, $190,000,000; that the Mutual and Equitable Life have combined resources of $1,091,000,000, making a total in these nine institutions of $2,489,000,000. The business of making large issues of securities of the great interstate corporations has during the past five years been conducted mainly on joint account between J. P. Morgan & Co., the First National Bank, and the National City Bank of New York; Lee Higginson & Co. and Kidder, Peabody & Co., of Boston; and the Illinois Trust & Savings Bank and the First National Bank of Chicago. This only partially illustrates their tremendous concentration of money and credit. Aye, more, not only do these gentlemen and their allies dominate business and finance, but they have grasped the reins of government and have given us a government by and for the trusts. Candor compels me to say that you may compare with fairness these identical men who control the Money Trust and they square completely and exactly with the names of those who financed the presidential campaign of 1904 for The Outlook editor, who now believes in emasculating the Sherman law by judicial amendment. The names of Morgan, Rockefeller, Stotesbury, Rogers, Archbold, Perkins, and others are found in the Money Trust group and the Political Trust group and fit into one another as the hand in the glove. Proof before the Pujo committee and the Clapp election committee reveal these two groups as being similar and joined together as the Siamese twins; and yet they are one and the same coterie. These things were first denied, but established by proof before these committees; all confess them.

INTERLOCKING DIRECTORATES.

George F. Baker, one of Morgan's partners and allies in the Money Trust, said at Washington that the banking credit of the country, amounting to $23,000,000,000, is virtually under complete sway of a small group of men in New York; that the leading banks, because of interlocking directorates, act in harmony in the control of large transactions; that the Nation's transportation interests in the same manner are under concentrated control and that the vast industrial enterprises are likewise dominated by this all-powerful association. He proudly boasted and explained the various devices employed to evade the law, or, as he phrased it, to "conform with the law." He admitted that in 50 years his single bank had collected $86,000,000 of profits upon a $500,000 capital; that banks were consolidated, despite the law, through the creation of holding companies; that there is a certain "concentration of power, in which Mr. Morgan is the overshadowing figure," and that the safety of the national interests lies solely in the personnel, the good intentions of these men. At last it is flaunted in the faces of the American people that these men have the safety of the Republic in their grasp and that we must trust to their goodness for our happiness and prosperity.

SOME OF THE PROBLEMS.

These things foreshadow some of the problems in Federal legislation, and we must meet them as men and patriots. Jackson won his fight and the Nation still lives. Wilson will win his and our institutions will survive and bless the generations yet to come. Turn where you will and there is a saturnalia of trust organization and monopolistic conspiracy. As Sir John Culpeper said in the Long Parliament, we may say of the trusts and monopolies now:

"They are a nest of wasps—a swarm of vermin which have overcrept the land. Like the frogs of Egypt, they have gotten possession of our dwellings and we have scarce a room free from them; they sup in our cups; they dip in our dish; they sit by our fire. We find them in the dye vat, washbowl, and powdering tub. They share with the butler in his box. They will not bate us a pin. We may not buy

our clothes without their brokerage. These are the leeches that have sucked the Commonwealth so hard that it is almost hectical."

These conditions point to the plain duty of Congress in some respects. We can drive out of interstate and foreign commerce every corporation with fictitious and watered stock, those whose capital stock is so great as to make them approximate monopoly, all holding companies, and all corporations whose stocks are owned and controlled by holding companies and other corporations. We can place a limitation on the capital stock of these corporations and banks; we can prohibit the holding and voting of the stock of these banks by other corporations; we can prevent interlocking directorates. We can prohibit their consolidating in the roundabout way now in vogue which piles up money in their vaults amounting to many millions of dollars to the detriment of the entire country. We have power under the Constitution to prevent this interlocking of directorates and coalescing of stocks and interests, and should hasten to apply it by congressional action. We know the facts, and a comprehensive law will bring the relief so manifestly just to the people. We can and should destroy protectionism and bring this country to a tariff strictly and only for revenue.

All these things will be consuming and burning political issues during the next few years and will not down till the appropriate legislative remedies have been devised and applied and the Government restored to the hands of the people, where their just rights will be safeguarded under a wise and courageous administration.

By a strange coincidence of history there have come out of the bosom of New Jersey the great trusts, the holding companies, and the gigantic monopolies. From this proud Commonwealth have come the dragon's teeth, and now it seems as if in the very providence and wisdom of God there has come from her borders the giant this year sent forth to exterminate the dragons infesting the land. When history is finally recorded, Jackson and New Jersey's governor will stand forth as the two great figures triumphing in memorable struggles as the champions of popular rights. We must have no class legislation and arraying of class against class. We must have no clamor against legitimate wealth honestly acquired. There must be no unjust attack against corporations and corporate powers within the limits of their granted charter rights. There should be no hysteria in our procedure. And still trusts and monopolies must be disintegrated and utterly eradicated. The conflict is and should be irrepressible.

As a legislator and an American I dedicate my energies to the people in this struggle, and with the Constitution as my guide and the sanctity of the law as my inspiration, I have enlisted in the contest until absolute equality for every citizen is again our watchword from ocean to ocean.

TRUST LEGISLATION

UNIV. OF MICHIGAN.
MAR 5 1914

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 2

STATEMENT OF

HON. AUGUSTUS O. STANLEY

JANUARY 29 AND 30, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Page.

Statement of Hon. Augustus O. Stanley, a Representative from Kentucky.... 65

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
R. Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	L. C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION,

SERIAL 7, PART 2.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Thursday, January 29, 1914.

The committee met at 10.30 a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Representative Stanley is here, and if it is the pleasure of the committee, we will hear him at this time.

STATEMENT OF HON. AUGUSTUS O. STANLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY.

Mr. STANLEY. Mr. Chairman and gentlemen, the chairman has kindly consented that I shall be allowed to present to-morrow morning my authorities in support of the contention which I shall make this morning. I desire to appear at such a time as will suit the convenience of the committee. I can, without making verbatim citations, present my reasons for the adoption of the bill H. R. 12121. At a subsequent date I hope to be able to present to the committee my views on the subject of holding companies. I shall not discuss the question of holding companies at this time, in one way or another, but will confine myself to a discussion of the bill to which I have referred.

In my opinion the most necessary thing to the successful enforcement of the Sherman Act is to restore it to its pristine vigor, which

can be done by the interpolation of a few words. In that you will avoid what is the possible obiter dictum in the Standard Oil case, and subsequently in the American Tobacco Co. case, in which the word "unreasonable" or "undue" is interpolated into the act of Congress. I can do that by so wording an amendment to that act as to make it mean exactly what the court has repeatedly said it did mean, and a short review of the decisions on this subject will show this committee conclusively that the act has been repeatedly interpreted to mean exactly what it says, that all restraints of trade are a violation of the act.

The use of the words "reasonable" and "unreasonable" and many of the arguments defending their insertion in the act are in a way "catch phrases," and commend them unduly to popular consideration. There seems to be an idea in the public mind that there is an effort on my part in introducing this bill or that it is the intention on the part of those who favor it to exclude reason from the act, to permit an unreasonable construction, or that the act as interpreted prior to the Standard Oil and Tobacco cases had not a reasonable construction.

The fact that for more than 10 years from the decision in the Trans-Missouri Freight Association case until the Standard Oil and Tobacco cases, the Supreme Court of the United States in discussing this question repeatedly refused point blank to give it that construction is an answer to that argument. For to admit that to interpret the act according to its plain meaning is unreasonable is to admit that for 10 years in construing it the Supreme Court of the United States and the astute judges of the other Federal courts acted without reason and ignored the "rule of reason" from the interpretation of the act.

It is a pregnant fact that both in cases before the Supreme Court of the United States and in bill after bill before this House there has been a repeated attempt to write that word "unreasonable" into the act.

An act was reported in this House by Mr. Hepburn, supported by a great many labor organizations, in which the word "unreasonable" was written into the act, and upon a hearing in this committee it was found that the alleged act to relieve labor organizations from the operation of the Sherman Act was in fact prepared by Messrs. Morowetz and Stetson and submitted to the president of the United States Steel Corporation before it ever saw a committee of this House.

If you will examine the reports of the Industrial Commission, you will find a repeated and persistent effort to write the words "reasonable" and "unreasonable" into the act, and the reason for that is not far to seek.

A court can determine, gentlemen, when a contract operates as a direct restraint of trade. A court can determine when the purpose of the act is to restrain trade and when the restraint of trade is merely collateral and is not the design of parties to it. Courts have had no difficulty in determining when contracts made and acts done were made and were done with the purpose of creating a monopoly, or of restraining trade, and when there was material restraint of trade.

But when courts attempt to determine that such actual or material restraint of trade is unreasonable, they leave the question of law and go into a question of fact which requires the most expert knowledge

for its determination. Railroads may make combinations in restraint of trade, combinations and contracts such as were evidenced in the Joint Traffic Association case, and the Trans-Missouri Freight Association case, and the Northern Securities case, and upon the face of the pleadings, upon an inspection of the contracts, upon the formation of the holding companies, courts can determine, without difficulty, that the purpose and effect of such contracts is to enable the parties to them to make rates independent of the law of supply and demand by their arbitrary fiat, and not such rates as would prevail under normal conditions of business. But if that court should further attempt to find whether or not the rate arbitrarily fixed was reasonable, they would be lost in a maze of technical discussion from which they could not escape without the most elaborate inquiry, if at all.

A few days ago I was in Kentucky in a case in which the Imperial Tobacco Co. was indicted under a statute intended to prohibit combinations in restraint of trade, but the Kentucky statute is so worded as to make the offense consist in raising or lowering the price of a commodity or actually limiting its production. In other words, the restraint must have some tangible result before the parties to it can be held responsible. It became necessary to prove that this company had reduced the price of the product purchased below the cost of production or had reduced it below that for which it would have sold in an open market. For two weeks we heard evidence as to the cost of producing a pound of tobacco, and as to what was the market price of that product. It happened there was no open or competitive market. Some company was arbitrarily fixing the price everywhere in that community, and to determine what the cost of production was you had as many opinions as you had producers of tobacco. There was a contract plainly in restraint of trade, made between the Imperial Tobacco Co. of Great Britain and the Imperial Tobacco Co. of Kentucky, whose plain purpose was to restrain trade. There was no question about that. But to determine the extent to which prices were actually affected—i. e., that there was an unreasonable restraint of trade—was a question of fact that was almost impossible of determination.

More than that, you will find that since the opinion in the Standard Oil case the objections to the enforcement of this act by Chancellor Day, and by all others who are opposed to a rigid enforcement of the Sherman Act, are based almost without exception upon the argument that that law punishes an "unreasonable" restraint of trade, and that that is a matter of opinion as varied as the number of judges upon the bench, that no two juries will ever be of the same conclusion as to just what is a reasonable or an unreasonable restraint, that no two judges will form the same opinion, and that to convict a man because some judge who has no technical knowledge of the business considers an act reasonable or unreasonable is a mistake; that the whole act is a farce.

But, when you come to the naked question of whether a contract was made for the purpose of restraining trade, and whether it does restrain trade, you have a very much simpler and easier problem.

The history of this act demonstrates the correctness of my position. Take the first case in which the question was sharply raised, the Trans-Missouri Freight Association case.

In that case the Government, in its petition, filed a contract made by freight associations west of the Mississippi River and running from the Gulf of Mexico to the Canadian line. In that contract it was recited that the rates fixed by the association were just and reasonable and were made for the purpose of protecting the best interests of the shipper and the carrier alike.

The defendants admitted the making of the contract, but plead that by its terms it provided only for such restraint of trade, if it did restrain trade, as was reasonable and as was not undue; that it provided against exorbitant rates; that it provided against such charges as were excessive; and that under the common law no reasonable restraint of trade could be punished; and for that reason, there being no such restraint as defined by the common law, it could not be in violation of the Sherman antitrust act, which was, in a way, declaratory of the common law.

Justice Peckham in the decision in that case—and I will call attention to the text of that decision to-morrow—stated that there were but two questions before the court. First, Are common carriers included within the provisions of the Sherman act, or are they provided for in the various transportation acts? Second, Were reasonable restraints of trade forbidden by the Sherman act? In that decision Justice Peckham declares that it was the province of Congress to determine whether it would include or exclude reasonable restraints of trade; that the law plainly stated that every contract and every combination and every effort to create a monopoly or to restrain any part of the commerce between the States, is contrary to the law, and that admitting this restraint to be reasonable, it was no excuse for the making of the contract, which was plainly in violation of the act.

A short time after the rendition of this opinion, the Joint Traffic Association entered into a similar contract, carefully prepared and rich in provisions that excessive rates should not be charged, that nothing should be done by the parties to the same, some 25 or 30 railroad companies, to unduly burden the shipper, and alleging with much unction that the whole arrangement was especially designed for the purpose of enforcing just, equitable, and reasonable tariffs upon all freights carried by all the lines.

Again, the defendants answered that they were not within the provisions of the Sherman Antitrust Act, that the rates were reasonable, that the contract showed that an unreasonable rate could not be charged, and that case, coming up on the pleadings, it was maintained by the Government that this association should be dissolved because it had entered into a conspiracy to maintain alleged "reasonable" rates.

The greatest lawyers in the United States argued at great length before the Supreme Court of the United States that the country was frightened by the radical position of the court taken in the former case of the Trans-Missouri Freight Association; that to prohibit common carriers from entering into any contract, whether reasonable or unreasonable, was to destroy their business, that their stocks were being depressed, that a condition of uneasiness akin to panic prevailed on account of this unprecedented decision.

Again Justice Peckham rendered the decision. In that decision he said this question had but a short time before been presented to

the court in the Trans-Missouri Freight Association case, in an appeal for a rehearing it had again been decided, and that the decree then rendered was in effect a third determination of the same question.

Justice White, in a profound and elaborate opinion, expressed his dissent. His opinion in the Trans-Missouri case is a much abler presentation of his side of the case than his subsequent decisions in the Standard Oil and Tobacco Company cases; it is more concise and more powerful.

Mr. NELSON. May I interrupt you there?

Mr. STANLEY. Certainly.

Mr. NELSON. That point was directly in issue in those cases?

Mr. STANLEY. That was the only point.

Mr. NELSON. How was it in the Tobacco and Oil cases?

Mr. STANLEY. It was not an issue at all.

Mr. MCCOY. May I ask you a question there?

Mr. STANLEY. Certainly.

Mr. MCCOY. The Supreme Court has never yet decided, if I understand correctly, as a matter of an actual decision, that there is any distinction to be put into the act between reasonable and unreasonable, has it? In other words, the opinions in the Tobacco case undertook to make a distinction between reasonable and unreasonable restraints, but there has never yet been a decision of the court, a binding decision of the court, that there is any such distinction?

Mr. STANLEY. No, I think it is obiter dictum in this case. A great many people, however, entertain a different opinion.

Mr. MCCOY. Is it not true that the Supreme Court decided that only, that on the facts shown in this case, the law was violated?

Mr. STANLEY. That is all.

Mr. MCCOY. They did not hold that they were unreasonable restraints, but were restraints within the act?

Mr. STANLEY. If I understand correctly, it is a peculiar thing in that case, that the Standard Oil Company made no plea that there was any reasonable restraint of trade. It was either an absolute and cruel and far reaching monopoly, or it had acquired a control of those properties by legal methods. Its defense was not that it did not control commerce in petroleum, or its by-products, but that it secured that control by legal methods. The question as to the control of commerce in petroleum would have been ridiculous if presented, because from the day of the Standard Oil decisions in Ohio, when they attempted to reach the same result by putting their business in the hands of trustees instead of a holding company, the courts have held it to be a far-reaching monopoly.

Mr. MCCOY. Then my further question would be, in the absence of a decision of the Supreme Court to the effect that under the law you can discriminate between reasonable and unreasonable restraints, why should there be any amendment?

Mr. STANLEY. Many doubt the extent to which this decision is to be considered as obiter dictum.

At the same time, there is much in the decisions in both those cases; in fact, if I remember correctly, the court expressly says that in so far as previous decisions of the court have excluded the rule of reason, or have excluded the right of the court to determine whether the restraint is due or undue, reasonable or unreasonable, the former decisions of the courts are amended if not overruled to that extent.

Mr. McCoy. Just one more question, and I will not interrupt you further.

Mr. Stanley. I am glad to have you ask me questions.

Mr. McCoy. Do you think that the title of the act, which was, as I remember it, "An act to prevent unlawful restraint of trade," was properly used by the Supreme Court in interpreting the act?

Mr. Stanley. I think not, and that question——

Mr. McCoy (interposing). Admitting for the sake of the argument that the use of the title was proper; that is, that the consideration of the title was proper, would not that necessarily lead to the conclusion that the court was right in saying that there was a distinction to be made, under the act, between reasonable and unreasonable?

Mr. Stanley. I doubt if I would go that far. I think there was an unfortunate use of the title, and I doubt the propriety of using the word "unlawful" in the title; I very much doubt whether the use of the word "unlawful" in the title of the act would justify the conclusion that by unlawful monopolies was meant such monopolies as are not reasonable, and by unlawful restraints is meant such restraints as are not reasonable.

In the first case decided, the Trans-Missouri Freight Association case, Justice Peckham expressly says that the wording of the title should not be used to construe the meaning of the act in which the language is unequivocal.

Mr. Chandler. You stated, I believe, in the introductory part of your remarks, that repeated attempts had been made to amend this act and to insert the words "reasonable or unreasonable," and that these attempts had been defeated. Do you know whether at the time of the passage of the act in 1890 an attempt was made to have inserted in the act the words "reasonable restraint of trade"?

Mr. Stanley. I will not be positive, but I think the debates in Congress will show that the matter was discussed; but I am not positive.

Mr. Chandler. Is it not a fact that in the briefs in the Tobacco cases it is asserted that that was a fact, and the court's attention was called to the fact that an attempt was made to insert the word "reasonable," and that it had been defeated?

Mr. Stanley. You are probably right about that. I do not recall the matter positively, in regard to the debates at the time of the passage of the act. In the Standard Oil cases the question in regard to the words, "reasonable or unreasonable" was not mentioned.

Mr. Chandler. Would the Supreme Court, in determining the intention of Congress in passing an act, be bound by subsequent attempts, subsequent to the passage of the act, to insert the word "reasonable", or only by the attempt made at the time of the passage of the original act? That is, the Congress which passed the act is the Congress whose acts are to be interpreted by the courts and not any subsequent Congress.

Mr. Stanley. I think the debates in the House touching upon this act would be only considered material by the Supreme Court in their determining any possible ambiguity in the language of the act, just as you would determine the meaning of a word in the act by a study of the conditions of the times and the interpretations of the word at the time of the passage of the act. The debates of Congress would be material only in clearing up any latent ambiguity in the language.

Mr. CHANDLER. The judicial branch of the Government, as I understand it, has no right to try to usurp legislative functions by putting meanings into an act which Congress did not intend. But in determining what Congress intended the court considers the debates in the Congress which passed the act and debates in subsequent Congresses which are not construed by the court?

Mr. STANLEY. Yes, sir; I think that is right.

Mr. CHANDLER. And the repeated attempts which you say were made in subsequent Congresses to amend the act are not to be considered?

Mr. STANLEY. Various efforts were made to amend the act in subsequent Congresses. I mention this to show you that those interests which are endeavoring to escape the operation of the law have seen that by the interpolation of the word "unreasonable" into the act the effective enforcement of the act was rendered impossible, because you can not enforce an act to punish an unreasonable restraint of trade. It is impossible to determine in a court of justice, in any proceeding of normal length, what is an unreasonable restraint of trade, and if the burden of proving that the restraint is material and actual and that in addition thereto it is unreasonable falls upon the plaintiff, his case is lost in the beginning.

Mr. MCCOY. In order to clear up the question of the use of the debates in the decision of the case, did not the Supreme Court say, in the Standard Oil case, that the debates could not be considered?

Mr. STANLEY. The Supreme Court has repeatedly held that debates in Congress are not binding on the court and are admissible only for the purpose of determining the meaning of ambiguous language in the act.

The CHAIRMAN. I think the rule in regard to that is as follows:

> Although debates may not be used as a means for interpreting a statute (United States *v.* Trans-Missouri Freight Association, 166 U. S., 318, and cases cited), that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

This quotation is taken from the case of the Standard Oil Co. *v.* United States (221 U. S., p. 1).

Mr. STANLEY. In other words, statements indicating the conditions prevailing at the time of the passage of the act are relevant in determining its meaning.

Mr. MCCOY. Is that not exactly what they limited the use of the debates to, namely, to ascertain what the evil was which it was sought to remedy by the act, but not to make use of the debates for the purpose of ascertaining the meaning of a word or a phrase which might be ambiguous?

Mr. STANLEY. I think it would be perfectly competent to clear up an ambiguity. But that is elementary law.

Suppose the court should be called upon to determine, in the case of the United States Steel Corporation, now pending, that volume of trade has been unreasonably restrained by any act of this company, a volume of trade that is like the flow of the Mississippi River, including hundreds of millions of dollars' worth of property, vast transportation lines, an industry covering a continent, that its underlying and interlacing relations with hundreds of other companies, its secret sales, its hold upon the market and upon the trade, was undue

and unreasonable. No mortal man can tell to-day what would be the price of any commodity under the law of supply and demand where the law of supply and demand no longer operates. In the steel investigating committee we developed the fact that steel rails for 10 years had sold for $28 a ton, but we were never able to determine just what would be a fair price for steel rails. Most of the men who had technical knowledge in that matter who were called before us were experts depending for their living upon the favor of some of these concerns, and they hesitated to testify. To determine what was the real price of the article, what it would bring in the open market, unaffected by artificial and arbitrary conditions, was absolutely impossible, and yet those facts are essential, those facts must be determined before you can pass rationally upon whether the restraint is reasonable or unreasonable.

Mr. CAREW. If it appeared that one set of men had the entire control of the situation, such as you have indicated, irrespective of the price or the cost, would not that be unreasonable and restraint? As I understand the common law, the condemnation of monopoly, is not because of the price for which the article was vended, but because of the power it gave the individual. If the steel company has entire control, do you not think that might be regarded as unreasonable irrespective of the price?

Mr. STANLEY. No; the steel company might have absolute control and not try——

Mr. CARLIN (interposing). What percenatge of the business does the steel company control?

Mr. STANLEY. The steel company controls approximately one-half of the output of finished steel. They abstain from control of the finished products in order that their absolute control over the price of the semifinished product shall not be manifest. In other words, the price of all steel products is determined absolutely by the price of pig iron. Steel billets are sold at so much above the cost of conversion.

Mr. CARLIN. What percentage of the pig-iron production does the steel company control?

Mr. STANLEY. They control it all; and they say they absolutely control the price of pig iron. They do not produce all the pig iron, but they produce a good proportion of it. Then they produce about 2,000,000 tons more of steel than pig iron.

Mr. CARLIN. What percentage of pig iron do they produce?

Mr. STANLEY. Approximately 60 per cent of the pig iron, and the rest of the pig iron is produced by companies that do not sell pig iron. The price of pig iron is fixed by a certain modicum of that iron in the open market. They have the capacity for producing more pig iron than steel, but they abstain from producing two or three million tons of pig iron a year and buy the rest of the pig iron in the market—by taking up all the marketable pig iron, fix its price.

Mr. CARLIN. Do you favor giving the Trade Commission the power to fix the price of the product?

Mr. STANLEY. No, sir.

Mr. MORGAN. As I understand your position, Mr. Stanley, you think we should enact laws that will absolutely prohibit every kind and character of contract which in any way restricts trade?

Mr. STANLEY. Yes, sir; that is what we did prior to the Standard Oil decision, and nobody was hurt.

Mr. MORGAN. You think that would be wise legislation now?

Mr. STANLEY. It is safe and sane, by experience. We are not trying to do some new thing. We are getting back to the pristine vigor of the act.

Mr. MORGAN. Should we not now, as we propose to legislate, consider, not what Congress intended to enact by the Sherman anti-trust law, but what should be enacted now for the good of the people?

Mr. STANLEY. Yes.

Mr. MORGAN. As the Supreme Court has construed this, should it rather not be a question or a controversy as to whether they are right or wrong, or what Congress intended, but what is best now? Is not that the proposition?

Mr. STANLEY. I will take that question up now. I claim that the only act that is at all effective is an absolute prohibition. By an absolute prohibition I do not mean to intimate that every contract which in any way restrains trade will bring the man who is a party to it into the courts, or subject him to harrassing litigation. It does not follow that when we prohibit all contracts in restraint of trade that contracts which restrain trade incidentally or in no pernicious degree to the normal discharge of business will necessarily bring the parties to them into court.

Mr. MORGAN. Why not?

Now, here is the proof that such an act will not be injurious to the best interests of business. For 10 years that act was repeatedly held to be just what it said, and no man suffered.

Mr. MORGAN. Was not the business public all the time violating it?

Mr. CHANDLER. Unconsciously.

Mr. CAREW. Would not the word "maximum" have the same effect as "unreasonable?"

Mr. STANLEY. I want to answer all your questions, and I will take them up one at a time.

Take up the first question; that is, Do the demands of business now require the writing of the word "reasonable" or "unreasonable" in that act? I will refer from memory now to a decision, and I will take pleasure in giving you the decision in full in support of what I say. The Supreme Court of the United States, and the Federal courts in some decisions, have held with emphasis that commerce is like a great stream, that it is illegal to impede its free and uninterrupted flow, that it shall flow untrammeled and uninterrupted; and Justice Harlan, in the Northern Securities case, said that any commerce, foreign or domestic, interstate or between nations, shall not in any way, anywhere, by any device, be impeded in any degree, and yet that law as at first interpreted by Judge Lurton and by Judge Day and Justice Peckham and by Justice Harlan remained on the statute books, and we have four volumes of Federal decisions on the subject, and there has not from the beginning until the end been a single case in which the court ever held that any defendant was guilty of a trifling invasion of that act, and yet now we are to emasculate this act to meet a condition that never occurred in 20 years in the enforcement of that act.

The common law on the subject is misleading, and the history of the common law is absolutely necessary to a correct understanding of the decisions which interpret it. You must remember that a monopoly, as discussed by Lord Coke, was a patent—nothing more; a monopoly of

business in a community where people seldom went 50 miles beyond their homes, as a rule, where the production of all the necessaries of life, of clothing, of implements of all kinds, all the major transactions, the production of iron and steel, were confined to a community of blacksmiths. The conditions rendered it absolutely impossible for any one man to get control of a business beyond the narrow circle of his immediate environment, and for that reason cases under the common law usually died with some man's selling out his rights to operate a shop or a mill, to engage in a profession in his community.

Mr. CAREW. Did not the making a monopoly the manufacturing of playing cards involve the whole realm of that subject?

Mr. STANLEY. A monopoly, to be effective, had to be by royal grant. It was not by the energy of an individual who gained control of thousands of miles of railroad and vast resources of coal and iron.

The power of the individual to take away from his competitor a legitimate business was unheard of; it was a physical impossibility. It never existed, and for that reason the monopolies with which Lord Coke dealt were royal grants.

Now, if I may digress. England never had more than 100 years of despotism in her whole history from the time of Bradicea and Canute until the end of the Wars of the Roses. Kings had little power. They were practically controlled by masterful barons who made and unmade them.

The invention of gunpowder made the yeomen the peer of the knights on horseback, and the power held by the barons and by the nobility was gone. In England it was gradually absorbed by the people. They took a part of it at Runnymede on the Thames, and in subsequent Bill of Rights.

In France, under Richelieu and Mazarin it was centered in the throne. For a while it appeared that the English Kings would become heirs to the powers of the barons, and so you found the Tudors the absolute monarchs from Henry VII to Elizabeth, and the most absolute among them was Queen Elizabeth herself. No English monarch ever exercised so absolute a sway.

Mr. NELSON. Before that time was there much granting of monopoly rights or patents?

Mr. STANLEY. Very little.

Mr. NELSON. Was she not compelled by public sentiment, to cease?

Mr. STANLEY. That is what I am coming to. She granted the right to make playing cards, and every conceivable thing, to various of her favorites. She recited that it was for the benefit of trade?

Mr. MCCOY. What was the condition of the law in regard to monopoly at the time of the adoption of our Constitution—I mean the law in England?

Mr. STANLEY. I am coming to that further on. I wish to get through with this proposition. Those Royal grants became intolerable, and the common people raised in rebellion for the first time against the autocratic and arbitrary monarch. She declared the Royal grants were the immediate jewels of her crown, and they were defended by the wisest man ever born of woman—Sir Francis Bacon. He admonished the Commons it was not for them to challenge the prerogative of an English Queen, that they should come as suppliants.

But he could not quell it, and at last in what is called her golden speech, that wise monarch, seeing she could no longer stem the tide of inveterate opposition, agreed that each and every one of her grants

should be turned over to the courts, and that they should determine the question. Lord Coke attempted to distinguish between the grants that were reasonable and unreasonable or undue in their restraint of trade, and in the various decisions in which he discussed monopolies, he admits it can not be done. He uses this strong language, "That there is not any degree in mischief." He declares that all monopolies are evil.

Mr. MORGAN. Is it not a fact——

Mr. STANLEY. Let me go on a little further. They found that you can not control monopolies by prohibiting those that were undue and unreasonable by leaving every royal grant to the determination of a court of chancery. In the reign of her successor, James I, they passed an act against monopoly, and I will submit that to the committee to-morrow. It is as sweeping and as drastic and as absolute in its definitions as the Sherman Act or the present act, for the reason that they found that even then you could not have good and bad trusts, and you could not have reasonable and unreasonable monopolies.

The judges in that day in their vain attempt to classify restraints of trade as reasonable and unreasonable admit their failure by the act of James I.

Mr. FLOYD. The question I wanted to ask you was this, Mr. Stanley. The Sherman law is written in language as broad as you contend for, without any exception?

Mr. STANLEY. Yes, sir.

Mr. FLOYD. And the courts for 10 years interpreted it in that broad light, and then finally under this interpretation given in the Standard Oil case, a question of unreasonable restraint of trade was interjected into it. How can we prepare a statute in any broader terms than the Sherman law? If they put this interpretation into the Sherman law how are we going to prevent them from making a similar interpretation of any new law?

Mr. STANLEY. You can incorporate into the law the words "in any degree;" that would do it, in my opinion.

Mr. FLOYD. In what section of your bill?

Mr. STANLEY. My bill provides that after the words "shall restrict any part of the commerce of the United States" the words "in any degree" shall be inserted, and I further provide that all evidence showing or tending to show that the alleged restraint was due or undue, reasonable or unreasonable, shall be admissible only for the purpose of determining a quantum of damages, or the degree of punishment, and for no other purpose whatsoever.

Mr. MCGILLICUDDY. Suppose you say, "in any degree;" what is to prevent the court from saying that you mean in any reasonable degree?

Mr. STANLEY. The further provision that that evidence shall be heard for one purpose only and for no other.

Now, I wish, hurriedly, to call attention to another matter. Outside of the difficulty or impossibility of determining whether a restraint is reasonable or unreasonable——

The CHAIRMAN. There has just been a call of the House, and the committee will have to adjourn at this time. We will hear Mr. Stanley further to-morrow morning.

(Thereupon, at 12.05 o'clock p. m. the committee adjourned until to-morrow, Friday, January 30, at 10.30 o'clock a. m.)

Mr. STANLEY. It will not do to assume that the defense that a contract is not in unreasonable restraint of trade will not again be made, when we consider that it was the first defense that ever was made to this act and that it has been constantly repeated. In the case of the United States *v.* The Trans-Missouri Freight Association, decided by the United States Supreme Court on March 22, 1897, which was the first great case under this act, and in which the court interpreted this law. In that case but two defenses were made by the Trans-Missouri Freight Association, first that the law did not apply to railroad companies, and second that the restraint of trade contemplated by the contract into which these carriers entered was not undue or unreasonable.

Said Justice Peckham:

The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers—all contracts of that nature?

We are asked to regard the title of this act as exhibitive of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "To protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful and which were to be prohibited by the Federal statute. We are of the opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term "contract in restraint of trade" includes only such transactions as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. Contracts may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade and would be so described at common law or elsewhere. By the simple use of a term "contracts in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

The court goes on to say:

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances, we are therefore asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it can not be supposed Congress intended the actual import of the language it used. This we can not and ought not to do. That impolicy is not so clear, nor are the reasons for the exceptions so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the road and in a failure to secure the advantages sought from such a policy. Whether that will be the result or not we do not know and can not predict. These considerations are not, however, for us. If the act ought to be read as contended for by the defendants, Congress is the body to amend it and not this court by a process of judicial legislation wholly unjustifiable.

Justice White, in a dissenting opinion in this case, clearly understood the full force and import of the strong and lucid finding of Justice Peckham.

Said Justice White:

To state the proposition in the form in which it was earnestly pressed in the argument at bar it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says every, there is no power in the courts, if they correctly and apply the statutes, to substitute the word "some" or the word "every." If Congress has meant to forbid only restraints of trade which were unreasonable, it would have said so. Instead of doing this it has said *every*, and this word of universality embraces both contracts which are reasonable and unreasonable.

Notwithstanding the fact that all restraints of trade, whether reasonable or unreasonable, were held to be in violation of the law, and notwithstanding the fact that the question was argued so exhaustively and decided so emphatically by Justice Peckham in the case of the United States *v.* The Trans-Missouri Freight Association, the same question was again presented in a case similar in all essential respects—the United States *v.* The Joint Traffic Association—in which thirty-odd railroads entered into an agreement which provided in terms for rates which were reasonable.

The opinion in this case was rendered by the same justice who decided the trans-Missouri case. He again insisted that this question had been previously deliberately decided.

In that decision he says:

Finally, a reconsideration of the questions decided in the former case is very strongly pressed upon our attention because, as stated, the decision in that case is quite plainly erroneous, and the consequences of such error are far-reaching and disastrous, and clearly at war with justice and sound policy, and the constructions placed upon the antitrust statute have been received by the public with surprise and alarm.

We will refer to these propositions in the order in which they have been named.

As to the first, we think the report of the trans-Missouri case clearly shows not only that the point now taken was there urged upon the attention of the court, but it was then intentionally and necessarily decided. The whole foundation of the case, on the part of the Government was the allegation that the agreement there set forth was a contract or combination in restraint of trade, and unlawful on that account.

Then, a little later in the decision, the court says:

The extract from the opinion of the court above given shows that the issue so made was not ignored, nor was it assumed as a concession that the agreement did restrain

trade to a reasonable extent. The statement in the opinion is quite plain, and it inevitably leads to the conclusion that the question of fact as to the necessary tendency of the agreement was distinctly presented to the mind of the court and were consciously, purposely, and necessarily decided. It can not, therefore, be correctly stated that the opinion only dealt with the question of the construction of the act, and that it was that the agreement did to some unreasonable extent restrain trade

And again the court said:

Finally, we are asked to reconsider the question decided in the trans-Missouri case and to retrace the steps taken therein because of the plain error contained in that decision and the widespread alarm with which it was received, and the serious consequences which have resulted or may soon result from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of the question but lately decided by this court is usually based upon a statement that some of the arguments employed upon the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While it is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the trans-Missouri case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three of the members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full decision of the questions involved and with a knowledge of the views entertained by the minority as expressed in the dissenting opinion that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

This court, with care and deliberation and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application; and now for the third time the same arguments are employed and the court is again asked to recant its former opinion and to decide the same question in direct opposition to the conclusion arrived at in the trans-Missouri case.

The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above mentioned has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice White that it is hardly possible to add to it, nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower court, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondent or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same argument which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

The idea that the Sherman Act was intended to be declaratory of the common law and to provide penalties for the acts which, under the common law, were simply void, and that the terms used in the act should be interpreted as they had previously been interpreted under the common law, was exploded in the earliest decisions rendered upon this subject. Said Judge Morrow:

It is not limited to contracts and agreements that were unlawful at common law, nor to restraints and monopolies in violation of State statutes.

In U. S. *v.* Trans-Missouri Freight Association (166 U. S., 290–327; 17 Sup. Ct., 540) the Supreme Court, referring to this title, said:

"The title refers to and includes, and is intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in the text."

The first and second sections of the act are as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In the freight association case, supra, it was contended that this statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, did not mean what its language imports, but that it only meant to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act. The court discusses this question and arrives at the conclusion that—

"When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is limited to that kind of contract alone which is unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

It is therefore no defense of a contract or combination, alleged to be in violation of the act, to say that, in view of all the circumstances and conditions, the contract or combination imposes only a fair and reasonable restrant upon trade and commerce. The question is, Does it impose any restraint whatever? If it does, no matter how little or reasonable it may be, it is within the prohibition. This interpretation is in harmony with the other provisions of the statute which make it unlawful to monopolize or attempt to monopolize any part of the trade or commerce among the several States or with foreign nations. The contract under consideration in the freight association related to traffic rates for the transportation of persons and property by competing common carriers by railroad; but the doctrine of the case applies as well to articles of commerce—the subject of transportation—as it does to the business of transportation itself; and the clear and positive purpose of the statute must be understood to be that trade and commerce within the jurisdiction of the Federal Government shall be absolutely free, and no contract or combination will be tolerated that impedes or restricts their natural flow and volume. * * * It is not, however, necessary to multiply authorities dealing with this statute. They are numerous, and they all clearly establish the doctrine that commerce among the several States and with foreign nations must be absolutely free and untrammeled, except as it may be regulated by Congress.

In the case of the United States *v.* The Addyston Pipe & Steel Co. (85 Fed., 278) the most elaborate endeavor was made to present conditions under which trade might actually be restrained without unduly or unreasonably affecting competition or limiting competition. These specious and yet plausible arguments were reviewed by the learned Judge Taft, afterwards President of the United States.

Judge Taft said, in the opinion on that case:

The contention on behalf of defendants is that the association would have been valid at common law and that the Federal antitrust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the Supreme Court of

the United States in United States *v.* Trans-Missouri Freight Association (166 U. S., 290; 17 Sup. Ct., 540), in which it was held that contracts in restraint of interstate transporation were within the satutes whether the restraints would be regarded as reasonable at common law or not.

A little farther along in the decision Judge Taft said:

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the States and were not unlimited in States; that such partial restraints were justified and upheld at common law if reasonable and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other.

The learned judge, admitting that all these things might be true, asserts with emphasis that under the Sherman Act there can be no excuse for its violation. He says:

Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade and tending to a monopoly.

The plain purpose of this act was not simply to punish combinations after they had produced an intolerable monopoly or had so restrained trade as to render their interference with it confessedly without reason or excuse, but to prevent any impeding or hampering of the natural flow of commerce. The purpose of this act was to protect trade between the States from any and all interference, from every character and description of restraint, and 14 years ago Justice Day, in deciding the case of the Chesapeake & Ohio Fuel Co. *v.* The United States, treated this interpretation of the law as settled beyond further question or cavil. In the course of that decision (115 Fed., 619) Justice Day said:

Is the contract in restraint of trade within the meaning of the law? As we understand the decisions of the Supreme Court of the United States, the construction of the statute is no longer an open question. At the common law contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts. (See opinion of this court, per Taft, circuit judge, in U. S. *v.* Addyston Pipe & Steel Co., 29 C. C. A., 141; 85 Fed., 271–279; 46 L. R. A., 122.) By the constitution of the United States, Congress is given plenary power to regulate commerce between the States and foreign nations. In the exercise of this power Congress may prevent interference of the States with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammelled flow of such trade. In the exercise of this right Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the States. (U. S. *v.* Trans-Missouri Freight Association, 166 U. S., 290; 17 Sup. Ct., 540; 41 L. Ed., 1007. U. S. *v.* Joint Traffic Association, 171 U. S., 505; 19 Sup. Ct., 25; 43 L. Ed., 259. Addyston Pipe & Steel Co. *v.* U. S., 175 U. S., 211; 20 Sup. Ct., 96; 44 L. Ed., 136.)

While this is the general rule to be deduced from the authorities, it is to be remembered that the Supreme Court has also declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect commerce." (U. S. *v.* Joint Traffic Assn., 171 U. S., 505, 568; 19 Sup. Ct., 25; 43 L. Ed., 259.)

The question is in each case, Does the contract or combination have the necessary effect to restrain interstate commerce? A contract or combination which interferes

with the freedom of interstate commerce and hinders or prevents its free enjoyment to the extent that it does so restrains that commerce and is illegal. It was the policy of the common law to discourage monopoly and to refuse to enforce contracts which had the effect to suppress competition. It was believed and declared by those who built up that system of jurisprudence that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part. It was in the same spirit and with the same end in view that Congress passed the act under consideration, which is aimed to maintain interstate commerce on the basis of free competition, and contracts which have the necessary tendency to restrain that freedom are within the contemplation of the law. The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer has been productive of more good than evil to the public. The Constitution has delegated to Congress the right to control and regulate commerce between the States. In the exercise of this right it has declared for that policy which shall keep competition free and leave interstate commerce open to all, without the right to any to fetter it by contracts or combinations which shall put it under restraint.

Judge Thayer, in the case against the Northern Securities Co., comments upon the wide and sweeping provisions of this act as indicative of the deliberate purpose of Congress to—

brand as illegal every contract and combination in the form of trust or otherwise, or conspiracy in the restraint of trade or commerce among the several States or foreign nations. Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

Further down, the opinion says:

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the Nation, and its opinion has been reiterated in no uncertain terms, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial.

To the same effect Judge Shepherd, in a charge to the jury in the case of the United States *v.* The American Naval Stores Co. (172 Fed. Rep., p. 455), says:

As to what constitutes a restraint of trade under the statute, the act prohibits any combination which obstructs the free flow of commerce between the States, or restricts in that regard the liberty of a trader engaged in business.

The prohibitory provisions of the act under consideration apply to all monopolies, combinations, or conspiracies in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable. The Government need not show that a conspiracy is entered into for the direct purpose of restraining trade or commerce, if such restraint is its necessary effect.

Every possible doubt remaining as to the all-embracing sweep of this act was removed by Justice Harlan in the Northern Securities case.

It does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.

The act is not limited to restraints of interstate and international trade and commerce that are unreasonable in their nature, but embraces all direct restraints imposed by any combination, conspiracy, or monopoly upon such trade or commerce.

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act.

That combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act.

That Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the antitrust act, has prescribed the rule of free competition among those engaged in such commerce.

And again, in the case of the Continental Wall Paper Co. *v.* Lewis Voight & Sons Co., Judge Lurton said:

As to the first point, it need only be said that the legality of the contract between the combining companies at common law, as imposing only a reasonable restraint upon the freedom of competition, is not a defense, if the dominant purpose of the agreement and the direct result of its operation is to directly and not incidentally restrain freedom of commerce between the States or with foreign nations.

Prior to the decision in the Standard Oil case some Federal judges at least had gone so far as to declare that the question of reasonableness or unreasonableness of the restraints was not even a matter for their consideration, was not a material fact or factor in the determination of cases charging a violation of the act.

In the case of The United States *v.* The American Tobacco Co., in the United States District Court for the Southern District of New York, the court said, in rendering its decision:

Every combination restraining competition in interstate trade is a combination in restraint of interstate commerce. As said by Mr. Justice Harlan in the Northern Securities case (193 U. S., 197–337; 24 Sup. Ct., 436, 457; 48 L. Ed., 679):

"To destroy or restrict free competition in interstate commerce was to restrain such commerce."

As was stated by the court in The National Cotton Oil Company *v.* Texas (197 U. S., 115, 129; 25 Sup. Ct., 329, 382, 49 L. Ed., 689), in speaking of the purpose of the State and Federal statutes against combination, said:

"According to them, competition, not combination, should be the law of trade. If there is evil in this, it should be accepted as less than that which may result from the unification of interests and the power such unification gives."

This construction of the statute confines the duty of this court in applying it within very narrow limits. We have only to inquire whether the evidence shows a combination restraining competition. There is no necessity for going further. Other inquiries are immaterial. The combination may not reduce the prices to the growers of raw materials, may not increase the prices charged to consumers, may not seek to exclude all others from the field, may be free from coercion or oppression, and yet if it restricts competition, if it restrain trade, reasonably or unreasonably, it falls within the statute. The statute declares unlawful every combination in restraint of trade. It contains no word of limitation or qualification, and the Supreme Court of the United States has decided that the courts have no right to attach them to it.

And Judge Lurton, in the case of Bigelow *v.* Calumet & Hecla Mining Co. (Fed. Rep., 167, p. 724), said:

We shall assume at the outset that the authoritative decisions of the Supreme Court have so construed this antitrust act as to give it a broader application than the prohibition of contracts and agreements in restraint of trade at the common law. It is not essential that the restraint shall be unreasonable within the well-understood definition of an unlawful restraint before the statute. Under this act the validity of an alleged combination or contract in restraint of trade, interstate or foreign, is to be determined by the terms of the statute which forbids any such contract or combination without respect to its nature or beneficial results.

In all the history of the Supreme Court, few judges have displayed greater learning, more exalted patriotism, or a more genuine abhorence of those insidious forces which tend to undermine and destroy the social fabric than John Harlan, and that justice has rendered no greater decision than his emphatic dissenting opinion in the Standard Oil case.

It was argued in that case and it has since been maintained that the interpolation of the word "reasonable" is a minor matter. It

was intimated then that it would not produce disastrous results, as it is suggested now that it has not materially impaired the force and effectiveness of this act.

Justice Harlan, in his dissenting opinion in the Standard Oil case (221 U. S., p. 82), says:

> In my judgment, the decree below should have been affirmed without qualification, but the court, while affirming the decree, directs some modifications in respect to what it characterizes as minor matters. It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that, "it does not necessarily follow that because an illegal restraint of trade, or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the Securities corporation, that a like restraint of trade or attempt to monopolize, or monopolization would necessarily arise from agreement between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation". Taking this language, in connection with other parts of the opinion, the subsidiary companies, are thus, in effect informed—unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go out of existence, they may join in an agreement to restrain commerce among the States if such restraint be not "undue."

In this opinion he shows that the act as thus interpreted ceases to become a warning and becomes a temptation to those who would throttle commerce and establish a monopoly.

After quoting extensively from the opinion of Justice Peckham, to which I have already referred, the court continues:

> I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight case in order to show beyond question that the point was there urged by counsel that the antitrust act condemned contracts, combinations, trusts, and conspiracies that were in unreasonable restraint of interstate commerce, and that the court in clear and decisive language met that point. It is adjudged that Congress had in unequivocal words declared that "*every* contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce among the several States" shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business Congress determined to meet and did meet the situation by an absolute statutory prohibition of "*every* contract, combination in the form of trust or otherwise in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contr cts, combinations, and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation* an exception not placed there by the lawmaking branch of the Government." "This," the court said, as we have seen, "*we can not* and *ought not* to do."

It has been argued at some length that the present efforts to eliminate the qualifying expressions "undue" and "unreasonable" is tantamount to demanding a construction of the act, tantamount to compelling the trade and commerce of the country to comply with an autocratic, unreasonable regulation.

Those making that suggestion and argument, have, in my opinion, failed to follow the long line of decisions to which I have referred, in which the Federal judiciary, without variance, and without dissent for 15 years, have uniformly held that it was not the intention of Congress, nor was it the province of the courts, to insert these words or to give to the act the construction interpreted in what I consider the obiter dictum in the Standard Oil case.

In the language of Justice Harlan, in the Standard Oil case (221 U. S., p. 98):

> The court says that the previous cases above cited, "can not by any possible conception be treated as authoritative without the certitude that *reason* was resorted to

for the purpose of deciding them," and its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason" or "the light of reason." It is more than once intimated, if not suggested, that if the antitrust act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court was delivered by a justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States, and lawyers who were recognized on all sides as great leaders in their profession.

The same eminent jurist who delivered the opinion in the Trans-Missouri case delivered the opinion in the Joint Traffic Association case, and the association in that case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases, when we think of the sagacity of the justice who expressed the views of the court or of the ability of the profound and astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words would amount to "judicial legislation"? Now, this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered the first inquiry will be that, as the court is unanimous in holding that the particular things done by the Standard Oil Co. and its subsidiary companies in this case were illegal under the antitrust act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which in frankness can be given to this question is that the court intends to decide that its deliberate judgment 15 years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the "rule of reason." In effect the court says that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

The law as amended by judicial interpretation is inevitably undermined. It may be true that the latent weakness due to this change has not yet been made manifest in the decision of any particular case; it may be that the exquisite structure of this act, insidiously undermined, is not yet visibly broken or shattered. It is undermined, nevertheless, and it is folly to wait until it topples about our heads before attempting to repair the injury.

Justice Harlan graphically describes the weakness and confusion which must inevitably result from the interpretation of Justice White:

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have not said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, providing you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely extended and harrassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract or combination or monopoly in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by anyone wishing to obey the law and not to conduct a business in violation of the law. But now it

is to be feared that we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer more fully than I have heretofore done to another and, in my judgment, if we look to the future, the most important aspect of this case. That aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of Government than the provisions under which were distributed the powers of Government among three separate, equal, and coordinate departments—legislative, executive, and judicial. This was at that time a new feature of governmental regulations among the nations of the earth, and it is deemed by the people of every section of our country as most vital to the workings of a representative Republic whose Constitution was ordained and established in order to accomplish the objects stated in its preamble by the means, *but only by the means*, provided either expressly or by necessary implication, by the instrument itself. No department of that Government can constitutionally exercise the powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered our Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded as otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged, many years ago, that it could not, except by "*judicial legislation*," read words into the antitrust act not put there by Congress, and which, being inserted, give it a meaning which the words of the act as passed properly interpreted would not justify. * * *

Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there; it has thereby done that which it adjudged, in 1896 and 1898, could not be done without violating the Constitution—namely, by an interpretation of a statute changed a public policy declared by the legislative department.

After many years of public service at the National Capital and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. * * * Mr. Justice Bradley wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. (Boyd *v.* United States, 116 U. S., 616, 635.) We shall do well to heed the warnings of that great jurist.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Friday, January 30, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will hear Congressman Stanley further this morning. You may proceed now, Mr. Stanley.

STATEMENT OF HON. AUGUSTUS O. STANLEY, A MEMBER OF CONGRESS FROM THE STATE OF KENTUCKY—Resumed.

Mr. STANLEY. Mr. Chairman and gentlemen of the committee, it is a source of surprise to me, or it was at least a source of surprise, that in the teeth of the most emphatic, the most exhaustive and unequivocal statements of the Supreme Court of the United States

that it would not, under any circumstances or conditions, or for any reason, write into the antitrust act of 1890 any condition by which combinations restraining trade would be tolerated if they would restrain it reasonably; that notwithstanding the fact that the courts, sometimes impatiently, sometimes elaborately, but always emphatically, both the Federal courts and the Supreme Court of the United States refused to put such a construction on the law.

Is it not worthy of the consideration of this committee, is it not a pregnant fact, that the greatest lawyers in America, representing in the total billions of capital and the production and transportation industries of a continent, should continually go into the teeth of what they knew was the law in what appeared for 15 years to be a vain endeavor to get the Supreme Court of the United States to grant this permit to restrain trade if they would do so beneficently, moderately, and reasonably?

If this had been a little thing, if it had been an unimportant thing, if it had been a privilege which amounted to nothing, or to but little, you would not have had this continual reiteration of their demand. It was because those interests which fretted under the simple, sweeping, and drastic provisions of the Sherman Antitrust Act wished to evade it, and because combinations in the form of holding companies, and those interested in them, knew that if ever that interpretation was placed upon the Sherman law it was doomed to be a dead letter.

And I say to this committee, notwithstanding the new decisions that have been rendered, that if, when you are through with your deliberations, holding companies can be organized, trade can be restrained at discretion, or, if you please, at the peril of him who restrains, with no other limitation placed upon him than that he shall correctly guess that the court that passes upon his conduct will not consider it unreasonable. This activity, this earnest, patient, insistent endeavor to induce the Supreme Court to do a thing that it said forty times over it would never do, was not confined to the Supreme Court.

In Congress after Congress they came, offering everything. This is not the first time, gentlemen of the committee, that great combinations in restraint of trade have come to Congress—"in honorable and voluntary surrender." They did it in 1908.

Survey the history of the irrepressible conflict between labor and capital, what have the large manufacturing and transportation concerns opposed so continuously and so viciously as the efforts of labor to organize in their several departments?

You have seen before this committee contests in which there was much temper on both sides between representatives of organized labor and of organized capital. The inquiry into the activities of the National Association of Manufacturers will show that this organization was created primarily to prevent the wholesale organization of labor. From the Homestead strike to the tinners' strike in New York a few years ago in the Steel Corporation, there has been one continual warfare.

And yet, although that contest had continued for 20 years, companies engaged in transportation and production alike came before the House and Senate and offered to surrender to organized labor, and to take specifically from under the operation of the Sherman Act every labor organization, if you would only permit them to write the

words "reasonable or unreasonable" into the organic law. They made concessions that they had refused in national conventions. If you will examine——

Mr. CARLIN. Who made that offer, Mr. Stanley?

Mr. STANLEY. If you will examine the Hepburn bill of March 23, 1908, you will find that it only applies to concerns having capital stock; excludes labor organizations from the operation of the act.

Why should they agree that no labor organization should henceforth be subject to the operation of the Sherman Act, notwithstanding the fact that the Supreme Court had repeatedly held that it could be? The act has been used with tremendous effect against labor organizations. To-day the most earnest plea labor organizations are making before this committee is that they shall not be included in the terms of the Sherman Antitrust Act, and you have bills looking to that end before you.

This Hepburn bill provided more than that. It provided, in section 10—and the bill in the House and the Senate was the same—you will remember the act; the bill provided, in section 10—

That any corporation or association registered under this act and any person not a common carrier under the provisions of the said act approved February fourth, eighteen hundred and eighty-seven, or the acts amendatory thereof or supplemental thereto, being party to a contract or combination hereafter made, other than a contract or combination with a common carrier, filed under section eleven of this act, may file with the Commissioner of Corporations a copy thereof if the same be in writing, or if not in writing, a statement setting forth the terms and conditions thereof, together with a notice that such filing is made for the purpose of obtaining the benefit of the provisions of this section. Thereupon the Commissioner of Corporations, with the concordance of the Secretary of Commerce and Labor, or of his own motion and without notice or hearing or after notice and hearing, as the commissioner may deem proper, may enter an order declaring that in his judgment such contract or combination is in unreasonable restraint of trade or commerce among the several States or with foreign nations. If no such order shall be made within thirty days after the filing of such contract or written statement, no prosecution, suit, or proceedings by the United States shall lie under the first six sections of this act for or on account of such contract or combination unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations; but the United States may institute, maintain, or prosecute a suit, proceeding, or prosecution under the first six sections of said act for or on account of any such contract or combination hereafter made of which a copy or written statement shall not have been filed as aforesaid, or as to which an order shall have been entered as above provided.

No corporation or association for profit or having capital stock and registered under this act, that hereafter shall make a combination or consolidation with any corporation or association, shall be entitled to continue its registration under this act unless without delay it shall file with the Commissioner of Corporations, pursuant and subject to the provisions of this section, a statement setting forth the terms and conditions of such combination or consolidation, together with a notice as hereinabove provided.

The part of that section to which I particularly call your attention is that part which says:

If no such order shall be made within 30 days after the filing of such contract or written statement, no prosecution, suit, or proceeding by the United States shall lie under the first six sections of this act, for or on account of such contract or combination, unless the same be in unreasonable restraint of trade or commerce among the several States or with foreign nations.

Mr. NELSON. Was that the act which President Roosevelt then recommended to be passed?

Mr. STANLEY. Yes, sir; and that act was still-born. That act that came into Congress heralded by organized labor, backed by millions of money, specifically supported by the President of the United States, slunk away in the darkness, and it has been a phantom ever since;

and I will tell you why, because in the course of that investigation this little colloquy occurred, which you will find on page 11 of the hearing on the Hepburn bill, in the Sixtieth Congress, first session:

The CHAIRMAN. Right there, Mr. Low, if there is no objection, who are the people that actually participated in the preparation of the bill? Who are the men who actually drew it?

Mr. LOW. We conferred with Mr. Gary, of the United States Steel Corporation.

The CHAIRMAN. E. H. Gary, president of their board of directors?

Mr. LOW. E. H. Gary, who is likely to be here this morning. He is in Washington, and I think he came on on purpose for this meeting. The lawyers actually engaged in the drafting of the bill were Mr. Stetson——

The CHAIRMAN. That is, Francis Lynde Stetson?

Mr. LOW. Francis Lynde Stetson and Mr. Morawitz.

The CHAIRMAN. Victor Morawitz?

Mr. LOW. Victor Morawitz. Prof. Jenks, of the federation, was in constant collaboration upon the subject. We also kept in close touch with the administrative departments of the Government through the Bureau of Corporations.

The CHAIRMAN. That is, Mr. Herbert Smith?

Mr. LOW. Mr. Herbert Knox Smith; yes.

So it transpires that this bill, which came very near getting through the House and Senate—this bill that actually eliminated organized labor from the operation of the act—was drawn by the same men, by the same pens that drew the charter of the United States Steel Corporation, and the charter of the Northern Securities Co., and who are the attorneys for the Steel Corporation now.

Mr. CARLIN. I do not exactly gather whether you favor excepting labor from the operation of the Sherman law, or whether you are opposed to it.

Mr. STANLEY. I favor excepting them, but that is not germane to this question. What I am trying to get before this committee is this, that in spite of the intense opposition of great manufacturing concerns to excluding labor organizations from the operation of this act they came and offered that as a precious inducement, to use a mild term, to Congress and to organized labor as the "king's ransom" they were willing to pay for this amendment to the act.

The plain purpose of Mr. Stetson and of Mr. Gary in eliminating organized labor from the operations of the Sherman Antitrust Act was to secure its influence, to popularize this thing that was meant to emasculate, and did emasculate, the Sherman Act.

Mr. CARLIN. The same proposition to exclude labor from the operation of the Sherman law is pending here now. Do you think that exclusion ought to be allowed?

Mr. STANLEY. Yes; but I do not care to discuss that question now. I desire, if we can, to stick to this proposition.

Mr. CARLIN. That is the very question you have been discussing.

Mr. STANLEY. I am not discussing the merits of that question at this time. I am simply trying to show this committee that notwithstanding the fact that the great producers fear and dread the exclusion of organized labor, yet are they willing to give even that up if in consideration for that sacirfice they could get the interpretation placed upon the Sherman Act which has been placed upon it.

Mr. CARLIN. I think I understand the point. The thing I am trying to get clear in my mind is whether you think this committee ought now to write into the bills pending an exception of labor organizations from the operation of the Sherman Antitrust Act.

Mr. STANLEY. Yes; undoubtedly.

Mr. NELSON. Would you not include also the exemption of farm organizations?

Mr. STANLEY. Yes, I would. I do not care, however, to discuss that question now, because that is a great big question in itself and I desire to confine myself at this time to the proposition that if you leave the words "unreasonable" or "reasonable" in the Sherman Antitrust Act, no matter what you do, or how much defining or enumerating you do, that you have emasculated this most wonderful piece of legislation. It is a jewel in itself, and I would not add another section to it; I would simply change this procedure, change a few words in such a way as to make it mean, unequivocally, what it meant before, so that a court could not misconstrue it.

Mr. CARLIN. The committee is seeking information, and we ask questions along the lines concerning the things which are in our minds. There is pending before this committee what is known as the Bacon-Bartlett bill, which provides for the exemption of labor organizations and agricultural and horticultural associations from the operation of the Sherman law. You have given a great deal of thought to this subject, and the committee would like to have your views on that matter.

Mr. STANLEY. I will be glad to give them to you, if they are worth anything. I can not too strongly indorse such a measure. Capital is organized. Without the right of organization, without the right to bargain cooperatively for the price of its body and soul, labor is helpless.

There are single corporations to-day employing more men than were ever commanded by any one man during the Civil War.

If 200,000 men must be taken separately and each individual known only by his number, often speaking a foreign tongue, must be forced to right his own grievances, however great they may be, labor is at the mercy of capital.

Mr. NELSON. May I interrupt you there?

Mr. STANLEY. Yes.

Mr. NELSON. What do you say to the argument that the wages of the workmen and the products of the farm constitute capital and therefore should come under the same rule which applies to trusts, to wit, that capital is not to combine?

Mr. STANLEY. The wage is capital when it is in the pocket of the employer, perhaps, but the sweat of the toiler and the time from dawn until dark of a living human being is not capital in any legitimate sense.

Mr. CARLIN. You are talking about combination and the evils of it. You think that there would be no evil in permitting those who produce the foodstuffs upon which the people have to depend for existence, and cooperating among themselves——

Mr. STANLEY (interposing). If any set of men were to get together and agree to organize a monopoly in the sale of wheat or corn, I would condemn it. With all respect, Mr. Chairman, I hope you will permit me to discuss that bill which is before you, rather than a matter which has no relation to the subject in hand.

Mr. CARLIN. The committee has not limited you in time. We are giving you our time, and with the view of getting information I was asking you some questions.

Mr. STANLEY. I appreciate that.

Mr. CARLIN. You will have to reserve the right to the members of the committee to ask questions for such information as you can give them.

Mr. STANLEY. I admit that.

Mr. CARLIN. Your argument was very interesting, but there are some things that we want to know which you have not reached yet, which may be developed by interrogatories.

This question of cooperative agricultural associations is proposed here seriously for legislation, and bills covering that matter are pending here now.

Mr. STANLEY. Then I will talk about that.

I assisted in the preparation of the first articles of incorporation of the first association ever formed for the protection of the tobacco planter, in 1903 and 1904. I assisted in writing the articles of incorporation of the first planters' protective association ever engaged in the sale of tobacco. I have assisted in the formation of quite a number of those concerns. They are purely defensive.

They can be formed, in my opinion, without violating the Sherman Act, by simply creating an association, to act as a broker to handle their products.

A combination was formed which depressed the price of tobacco from 6 cents to 3 cents a pound in 90 days. You will find in the diary of Thomas Jefferson that he sold tobacco for 6 cents a pound, and tobacco down in that country had in all that time since then never brought much less than 6 cents a pound.

The country was divided into magisterial districts. There was one buyer in each district, and there was no secrecy in regard to the plans and purposes of the buyers. They said, "Nobody can buy here except this man." If a public road ran through a man's farm, one buyer would buy tobacco on one side of the road and another buyer would buy the tobacco on the other side of the road.

Mr. NELSON. You are speaking of the present time, or was that in the time of Thomas Jefferson?

Mr. STANLEY. Since the time of Thomas Jefferson by a good many years. There was an agreement entered into by the representatives of the tobacco monopoly in Europe, by the Imperial Tobacco Co., a monopoly in Great Britain, and the American Tobacco Co., a monopoly in the United States, by which they agreed that they would send out buyers, no two to go into the same district. They would price the tobacco and take it and then throw it into a clearing house, and each fellow would select what he needed from that clearing house and would get it at the same price paid for it by the buyer.

They concluded that tobacco could be raised for 3 cents a pound. That would mean about 20 cents a day to the man who raised it, and he had to work all day long to get that. There was misery and destitution and horror all over that country. Many left the country. A man for a full year's work got less than a hundred dollars, in many instances, and those farmers agreed to place their tobacco in an association, giving the association the absolute right to sell it when they thought best. They held the tobacco for three years and sold it at a reasonable price. I do not think the Sherman Antitrust Act ought to affect such an association. It was rendered necessary by the cruel violation of the Sherman law, and it was all that was left for them to do.

Mr. CAREW. What shall we say to that immense class of business people in this country who are sincere and who want definiteness more than they want anything else? For better or worse, they want something absolutely definite; they want to know what they can do and be sure of what they can not do.

Paralysis is a frightfully definite thing, but license and liberty are indefinite. I presume by repealing everything we could fix that. But somewhere there is a mean for which they are searching, and I would be very happy to have somebody state where it lies.

Mr. STANLEY. I am "delighted," as an ex-President of the United States would say, at that question.

The one thing that made the Sherman law a terror to evildoers was its definiteness. To make it indefinite was the prime purpose of the proposed amendment.

Those two words, "undue" and "unreasonable" have created a fog about this law which those who fear it hope to make impenetrable, asserting that since we can not determine what is reasonable or unreasonable, that the law is an absurdity.

They take out those two words, and for fifteen years the courts had no difficulty in interpreting this act.

Put in the word "reasonable," and the enforcement of the law is impossible.

Mr. CARLIN (interposing). Do you not think that since the Knight case they have had a very different line of decisions?

Mr. STANLEY. I will come to that Knight case.

Mr. NELSON (interposing). Before you leave that point, I wanted to clear up this particular matter in my mind. What effect is the writing of the word "unreasonable" into the statute to have on the penalty?

Mr. STANLEY. As a penal statute it renders it impotent, and my authority for that statement is Senator Nelson, among others. I call the attention of this committee to a report made by the Senate Committee on the very bill in which it attempted to write the words "reasonable or unreasonable" into the act.

Senator Nelson, in his report, dated January 26, 1909, and being Report No. 848, Sixtieth Congress, second session, at page 10, says:

> The antitrust act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. Justice Brewer in the case of Tozer *v.* The United States (52 Fed., 917), makes this perfectly clear and plain. In this case the defendant was indicted for violating the interstate commerce act. In stating the facts, the court says: "The Missouri Pacific charged the Chicago, Burlington & Quincy Co. only 34 cents for carrying the sugar from Hannibal to Hepler, while it charged the Hayward Grocers Co., and others living in Hannibal, 46 cents for doing a like work; and it was held (in the lower court) that this constituted a giving to one person an undue and unreasonable advantage, and subjected one to unjust and unreasonable disadvantage, within the denunciation of section 3 of the interstate commerce act."
>
> And upon this the court holds: "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend on whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of Railway Co. *v.* Dey (35 Fed. Rep., 866, 876), I had occasion to discuss this matter, and I quote therefrom as follows: 'Now, the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punishable by fine, and that such a statute

is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be a reasonable rate. If this were the construction to be placed on this act as a whole, it would be certainly obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'"

Defendant was guilty in the lower courts. The decision was reversed.

See also the following cases bearing upon this point: Cook *v.* State (26 Ind., 278); Louisville & Nashville R. R. Co. *v.* Commonwealth (99 Ky., 132); Louisville & Nashville R. R. Co. *v.* Railroad Commissioners (16 Am. & Eng. Ry. Cases, 1); Ex parte Andrew Jackson (45 Ark., 158).

And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court or jury in Wisconsin might find the same agreement and combination unreasonable.

In the case of the People *v.* Sheldon (139 N. Y., 264), Chief Justice Andrews remarks: "If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity although the moral evidence might be very convincing."

The following cases take the same grounds: Judd *v.* Harrington (135 N. Y., 105; 34 N. E., 790); Leonard *v.* Poole (114 N. Y., 371; 21 N. E., 707); De Witt Wire-Cloth Co. *v.* N. J. Wire-Cloth Co. (Com. Pleas N. Y. Supp., 277).

To amend the antitrust act, as suggested by this bill, would be to entirely emasculate it for all practical purposes, and render it nugatory as a remedial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, and highly remedial. It practically covers the field of Federal jurisdiction and is in every respect a model law. To destroy or undermine at the first juncture, when combinations are on the increase and appear to be as oblivious as ever of the rights of the public, would be a calamity.

Mr. CARLIN. What happened in the cases against Patterson?

Mr. STANLEY. They put him in jail.

Mr. CARLIN. Under the Sherman law, did they not?

Mr. STANLEY. I do not think, Mr. Chairman—I can not see that because they happened to hold that Patterson was in unreasonable restraint of trade upon the facts presented in his case that that is any reason why we should say that because certain notorious malefactors have not escaped this yawning breach in a righteous act, we should leave it open.

Mr. CARLIN. I understood you to argue that the Sherman law was not effective as a criminal statute, and I simply wanted to point out that case.

The CHAIRMAN. Take the case of the wire pool; there convictions were had.

Mr. STANLEY. Because some men are convicted under the statute, it does not prove that many who are guilty will not be convicted. Because some men have not seen fit to make a defense of unreasonableness, is no reason why that defense should be permitted to stay in the act.

Mr. CARLIN. Do you know of any case of criminal prosecution where a demurrer to the indictment has ever been sustained under the Sherman law for any such reason as you have assigned?

Mr. STANLEY. I presume—yes—you mean since the Standard Oil decision?

Mr. CARLIN. Yes; I mean——

Mr. STANLEY. I do not know that I recall any.

The CHAIRMAN. Take the case of the naval stores.

Mr. STANLEY. I have that case here.

The CHAIRMAN. There the criminal prosecution was upheld.

Mr. STANLEY. That was prior to this case, and in the case of the naval stores the court deliberately instructed the jury that they could not consider whether an act was reasonable or unreasonable.

Mr. NELSON. These instances which have been mentioned occurred before the Standard Oil and Tobacco cases?

Mr. STANLEY. Nearly every one of them; the naval stores did.

Mr. CARLIN. The Patterson case has occurred since.

Mr. STANLEY. That is one I recall.

Mr. CARLIN. Take the instance of the indictment of the officers of the Steel Trust. There there was a demurrer to the indictment; the court overruled it: and they went to the jury, and they were acquitted by the jury. In the case of the Sugar Trust in New York, there there was a demurrer to the indictment, and the demurrer was overruled, and they went to the jury, and it was a hung jury. That is the Parson case. I think there has never been an instance brought to the attention of the committee where a demurrer to an indictment has not been sustained where the indictment was brought under the Sherman law.

Mr. STANLEY. I have the Naval Stores case. It is in 172 Fed. Rep., 464. In that case the court said:

> I charge you, further, that the prohibitory provisions of this act under consideration apply to all monopolies, combinations, or conspiracies in restraint of interstate or foreign trade or commerce, without exception or limitation, and are not confined to those in which the restraint is unreasonable.

Mr. CARLIN. The court charged the jury in accordance with your contention, but against your view of the amendment.

Mr. STANLEY. How is that?

Mr. CARLIN. The court charged the jury exactly what was the law.

Mr. STANLEY. At that time that was the law; there was not any question about it.

Mr. FLOYD. Was that a report on the Hepburn bill from which you were reading awhile ago?

Mr. STANLEY. Yes, sir.

Mr. FLOYD. Congress has never amended the act; it stands to-day.

Mr. STANLEY. The Hepburn bill did not pass.

Mr. FLOYD. I know. The Sherman act has never been amended; it stands to-day just as definite and certain, so far as language is concerned, as when it was first written.

Mr. STANLEY. I understand.

Mr. FLOYD. What I am at a loss to know is how you can by an amendment make it any more certain; if the court construes that definite statute in a way that imposes conditions or limitations, how can you, by reasserting that, make it any more definite than it is now?

Mr. STANLEY. If we are to take the position that the Supreme Court is never to be bound by the plain import of any statute because in one case it failed to be so bound, Congress might just as well adjourn. We are going through a hollow mockery. If laws are never to have a simple interpretation, if the Supreme Court of the

United States, with the bridle off, is to give effect to its own ideas, notwithstanding anything that we may do, we are in an appalling condition and we had better quit doing it.

Mr. CARLIN. Can you give us an illustration of what you would consider, under the definition of the Supreme Court, a reasonable restraint of trade?

Mr. STANLEY. I never try at that sort of mental gymnastics, because it is pernicious; it is immoral to try it. It is the most abominable kind of causistry to attempt any such conception. It is the finest instance I know of of legal causistry.

Nothing has ever tended, Mr. Chairman, to undermine and to destroy all ethical advancement, whether it be divine or human, as this centuries old effort to write "reasonable" or "undue" or some other term or limitation before an essentially pernicious thing.

As I see it, monopoly is larcenous. Larceny, in its broad sense, is the taking of the property of another without a sufficient consideration. It has as many forms, they are as multitudious, as cupidity can suggest and ingenuity can contrive.

Mr. CARLIN. I think you have misconceived my question. I was trying to direct your attention to what is a fact, namely, that the Supreme Court has never yet found a reasonable restraint of trade. I was just wondering if, in the imaginations of men, or even in the minds of those who have been thinking seriously on the subject, whether a reasonable restraint of trade could be found.

Mr. STANLEY. It is liable to be found and it is liable to occur.

Mr. CARLIN. You have no illustration in your mind?

Mr. STANLEY. No; and I will show you how pernicious the reasoning is. You know that the ancients attempted and afterwards learned eccliastics attempted to relieve humanity from the simple and sweeping provisions of an antisin act handed down from Mount Sinai to Moses on a certain occasion, and they attempted to write "reasonable" and "unreasonable" before various acts. There is no doubt that there are occasions when deceit and falsehood are excusable and sometimes commendable, but there is nothing that so destroys truth, that hides her beautiful and perfect outline in a poisonous fog like reasoning on when it is right to lie.

Mr. CARLIN. You have been arguing before this committee that the use of the word "reasonable" by the Supreme Court has opened the door to innumerable and menacing and injurious restraints of trade. For that reason I asked you to point out some restraint of trade to which that has opened the door, by way of illustration.

Mr. STANLEY. It has opened the door to every restraint of trade not manifest on the surface. I am willing to admit for the sake of the argument that there have been 10,000 cases before the court, yet the mere fact that these people happened not to get by a defective statute does not cure the defect, and if it is manifest to the lawmakers——

Mr. CARLIN (interposing). I agree with you about that. But since we have not yet discovered, by a decision, a reasonable restraint of trade, I was wondering whether or not you could give us an illustration of one. The court itself has never found one.

Mr. STANLEY. Suppose the court should attempt to find one. Men who have studied not the human law, but the divine law, with Bibles on their knees, attempted for a century to find what was a

reasonable or a justifiable falsehood; to find what was a reasonable or justifiable theft; to find what was a reasonable bearing of false witness; and when they were through, it is the consensus of opinion of all mankind that it was casuistry, that it was pernicious, that it was deceptive of the chaste, plain, simple definitions given by God Himself. The human conscience is not enlightened by such sophistry, and it is not sharpened by the drawing of such fine distinctions. Such inquiries take you not into the light, but into a labyrinth of utter darkness.

Mr. CARLIN. Do you admit that you have no illustration in mind of an unreasonable restraint?

Mr. STANLEY. I admit that I have never once dreamed of trying to find it, using such mind as I have, and such knowledge of the law as I have. Suppose I should—suppose I should spend weeks and months in trying to find what is a reasonable restraint of trade, or just how far combinations could go in putting a ligature about the throat of commerce that would not strangle it fatally or materially? Would that knowledge, would such a statement, furnish to those who are anxious to restrain it as far as possible and keep out of jail be of very useful service to the committee or to the industrial conditions of the country? Suppose this committee should confine its efforts to trying to determine restraints of trade which were not in violation of the act as construed by the Supreme Court in the Standard Oil and Tobacco cases; this committee could not be engaged in a worse work. That would be doing exactly what some of the greatest legal minds of the country have been engaged in for the last 20 years.

We would be engaged in advising avaricious organizations just how near the precipice they could go, just how they could steer the bark between the Charybdis of the law and the Scylla of monopoly. That character of advice has been very valuable, and it has enabled those who write the charters of great corporations to make rings around the less carefully drawn acts of Congress. I do not wish to tell them; I do not care to say how near the precipice they may go. I say it is no part of our business to find just how far these people can go. Think of it. Remember the thing that restrains trade is the holding company, an engine powerful enough to absolutely destroy competitive conditions, because it has done it.

Suppose you should say that a holding company may reduce prices *thus far*. A holding company may have so many subsidiaries; directors may interlock to the extent of 10 per cent, and that if they go no further, it will not be an unreasonable restraint of trade. Do you not see that you say to these people, "you may use these things that are pernicious, you may go around with a deadly weapon upon your hip or poison in your pockets, with the power of life and death in your hands, and you may use them in this way."

No. If the thing is pernicious, if it is mischievous, and if it is indefensible, you should prohibit it. You should say to the combinations in restraint of trade not, "Thus far shalt thou go and no farther; thou shalt sin in this degree and receive an indulgence to monopolize trade but not unduly." That is simple sophistry.

Mr. CAREW. Are we going to an era now where we think the courts and prosecuting attorney will furnish a remedy and erroneously

relying upon that engine and that manifestation of power instead of legislating in order to make it not to pay to monopolize?

You remember reading, no doubt, where they used to hang men in London for paring coins, and finally they milled the coins, and made the coins no good if they were scraped off, and they did not have to hang any more men.

We have a bill here that practically means every small man in the United States as against all the combinations, and if they attack and destroy every one of those, if it is an interstate concern, they must attack all, the object being to protect those men by making it a very expensive operation to attack them with the purpose of injuring or destroying their business?

Mr. STANLEY. I think the certainty of the punishment is the thing.

Mr. CAREW. But the setting of them against each other; instead of the prosecuting attorney, we have the business heads of all the Nation, in a small way, to be an army against those combinations, and to be able to protect themselves.

Mr. CARLIN. He is directing your attention to a bill which is pending here.

Mr. STANLEY. I do not know about that bill.

Mr. FLOYD. You speak of the holding company; that is a very vital thing. I was going to ask you whether you are in favor of prohibiting all holding companies, absolutely?

Mr. STANLEY. I am in favor—oh, no. There are a great many cases where the holding of the stock of a corporation is necessary and legitimate. I would only prohibit one corporation from holding the stock in another corporation where the holding of the stock was no part of its legitimate business.

Mr. FLOYD. I wanted to get your idea.

Mr. MORGAN. You mean you would not permit competing companies to hold the stock of each other?

Mr. STANLEY. I do not know that I would say that.

Mr. MORGAN. Have you a paragraph in your bill expressing your ideas as to holding companies?

Mr. STANLEY. Oh, no; defining them. I say specifically in my bill what companies can hold the stock of other companies and what companies can not hold the stock of other companies.

Mr. MORGAN. Have you the bill before you?

Mr. STANLEY. No; I will take that up next Thursday.

Mr. MORGAN. Coming back to the point of your argument, what reason was there apparent in the mind of the court that led the court to argue for this word "unreasonable" in the statute, especially as in any way curative of the statute?

Mr. STANLEY. None in the world. It was not even before the court in that case.

Mr. MORGAN. The court, of course, construed the statute in order to get at the legislative intent, saying that the common law was a part of the statute. If we insert language which shows that the legislative intent is not to have the word "unreasonable" in there, would it not be likely that the Supreme Court would not again read the word into it?

Mr. STANLEY. I am certain of it. I think you have hit the crux of it.

We must not assume that because the Supreme Court in a single instance has by an obiter dictum absolutely disregarded the plain letter of the law it will always do so. Such an admission would nullify Congress. For us to say that we will not pass any act restraining you or anybody else because no matter how plain we make it the Supreme Court is going to unmake it would be the monstrous and absurd.

Mr. CARLIN. What I have been trying your mind to is what is in the minds of many of the members of the committee. That is, first, whether the criticism of the Supreme Court is just, in view of that fact that it has never yet found a reasonable restraint of trade, and in every case has found the restraint unreasonable, and whether or not you are not getting into a realm of conjecture rather than getting away from it when we undertake to disturb the line of decisions which have been as wholesome as those we have had.

Mr. STANLEY. What cases have you had since the decision of the Standard Oil case?

Mr. CARLIN. The American Tobacco Co. case.

Mr. STANLEY. What case have you had that——

Mr. CARLIN (interposing). I think that the American Tobacco cases.

Mr. STANLEY. It is the same result. What case have you had since that? You have had the Union Pacific case, the reorganization of the Union Pacific, that was so absolutely monstrous that it seemed to be simply a case of common larceny. There was no question in regard to reasonable restraint of trade there. It was a question of one company having purloined another company without paying for it.

Mr. DANFORTH. The point Mr. Carlin is raising is this: Why change a law which has been so far administered wisely until there is an unwise administration of the law under this statute? You say there has not been a case——

Mr. STANLEY (interposing). Shall we wait until the thing happens that we know must happen before we attempt to remedy it?

Mr. DANFORTH. How do you know that?

Mr. STANLEY. Because we know that the minute the question comes up before that court of an admitted restraint that is not apparent the defense of unreasonableness will be made, and that the minute it is done it is a precedent, and some other case comes up and it is not reasonable, until you go on and on, as you have done in Pennsylvania, with the question of the liability of employers, until it was practically impossible for an employee to be hurt in any way for which his employer was liable.

Mr. CARLIN. Those statutes are all in regard to definite, existing conditions, and are intended as remedies for evils which exist.

Mr. STANLEY. This statement of mine, that this interpretation of the act renders it nugatory, renders it void, indefinite, indefinable, arbitrary, worthless, is not the statement of a radical, wild-eyed crusader against combinations of all kinds. I do not think anybody will accuse Chancellor Day of being a radical, and he takes the same view I take. Let me read you what he said about it:

A few days ago the President of the United States is reported to have stated in a public speech that our great business men were guilty of lawlessness. Lawlessness can by no justice or truthfulness be applied to men who find themselves in violation of a statute that for 21 years no one has defined, and which finally the Supreme Court

of the United States, unable to interpret it beyond a guess, brushed aside as a troublesome thing, by saying men must use their reason in interpreting it, leaving to one man with power of prosecution to say whether reasoned reasonably. (The Law Journal, March, 1913.)

Mr. DANFORTH. We are talking about legislation which is proposed, and you bring in to us bills which you want to discuss. What we are trying to get is how those bills are going to improve the present law, and what Chancellor Day has to say about it does not seem to me to have any bearing on them, because what we want to know is whether your bills will strengthen the law.

Mr. STANLEY. My bill renders the law definite and certain, if any restraint.

I say that to say you may restrain trade, you may materially restrain and actually restrain trade, if you do not unreasonably restrain it, is to instruct the man who is about to restrain it and to invite him to do it and to tempt him, to conjecture with him, putting words into the act which render it difficult of interpretation, and leaves him hanging between the realm of what is innocence and what is guilt.

Mr. DANFORTH. Mr. Carlin is trying to get from you any case in which the plain words of the Sherman Act have been violated, and you admit that there is no such thing. We all know there is no such thing, but you say there may be such a thing, and therefore you propose to give further definitions of what shall be restraint of trade.

But, as Mr. McGillicuddy said to you yesterday, what is there to prevent a court, in a surmised case, translating its words just as you say they have, translating the words of the Sherman Act by putting in the word "unreasonable" or "undue"? They can go on and interpret the act with your amendment, if it should become a law, as Mr. McGillicuddy suggests, and as you say they have already interpreted the Sherman Act. They have not put the words in yet.

Mr. STANLEY. I did not understand Mr. McGillicuddy to suggest that this bill that I have introduced would be as incapable of remedying the evil as if it had not been introduced.

Mr. DANFORTH. No; but he said, What is there to prevent the court from doing the same thing in that case? We are going into a very uncertain realm, because you will admit the court never has interpreted that statute as having the word unreasonable in it; but you say they have declared an obiter dictum which shows in which direction their mind is tending, and therefore you believe they are slipping from their high pedestal, and you propose to give them the benefit of this additional legislation; and, as Mr. McGillicuddy said yesterday, what would prevent the court from interpreting that statute with your amendment in exactly the same way that you say they are prepared to interpret the Sherman law?

Mr. MCGILLICUDDY. I think Mr. Stanley understood me. The law already is against restraint, in part; your amendment reads that they shall not restrain trade in any part. What added strength would it be if you say they shall not restrain it in any degree?

Mr. STANLEY. I add, you "shall not restrain any part of the commerce of the United States in any degree." The court has said that this law has divided commerce into certain divisions, and it meant that these various parts of commerce—of production, of transportation, and things like that—should not be restrained, that no part should be restrained. None of these vast divisions were sufficiently

defined. I say that none of the various parts of the commerce of the United States shall be restrained in any degree.

Mr. MCGILLICUDDY. They will come back and say, "in any reasonable degree."

Mr. STANLEY. Oh, but, Mr. McGillicuddy, we can not assume that the Supreme Court of the United States will always refuse to interpret the plain language because it once may have done so. If that be true, if we are going to say the Supreme Court will do that, why pass any act at all which the Supreme Court is to pass upon? Have we reached the sad condition prophesied by Thomas Jefferson?

Mr. MCGILLICUDDY. If that is true, as quick as the personnel of the court changes with respect to one person, they will go back to the original interpretation of the Trans-Missouri case.

Mr. STANLEY. I hope they will; I believe it will do no harm to put it in there.

Mr. CARLIN. Is your bill based upon the fear of what is possible to happen, rather than upon anything that has occurred?

Mr. STANLEY. It is based upon my regret for a condition that now exists.

Let me call your attention with reference to what this interpretation has done for the law in a report of this committee, and I do not think people will accuse Mr. Littleton of being radical. He says of Justice White's decision in the interpretation of the law: "He does not denounce contracts or agreements."

In speaking of the effect of Justice White's decision, Mr. Littleton said:

> For a time at least, the distinctly business section of the country stood still in a state of uncertainty and doubt; those concerns already organized, in many instances, fearful of prosecution; those concerns which were in contemplation, arrested lest they should trangress the law. The immediate bewildering consequence was that a dense fog of uncertainty settled down and completely enveloped American enterprise.

Chancellor Day says the same thing, that when we read "reasonable" or "unreasonable" into the law we have placed an impossible task upon the courts and given an uncertain guide to business.

Mr. FLOYD. The word "unreasonable" has never been written into the law. It is not in the power of the court to write a word into a law; they must construe the law as already written, and that law is as definite as what you proposed; it prohibits every restraint of trade in every degree.

Mr. STANLEY. Do you mean to say that an act can not be construed by a court in such a way as to give it the same effect as if it had been actually written as the court construed it?

Mr. FLOYD. No; I do not mean that; but I do mean to say that, notwithstanding Justice White's declaration on the subject, that no case in which that point has been raised has been held adversely on the ground that the restraint complained of was not unreasonable. Then, why the law?

Mr. STANLEY. Certainly so great a lawyer as my colleague, the gentleman from Arkansas, will not contend that it is conclusive? I do not believe that you will say to me that because the court, in the few cases involving the Sherman antitrust law that have been passed by the Supreme Court of the United States since the decision in these two cases, has not found a reasonable restraint of trade, that that is conclusive evidence that such a thing does not exist and will not occur, and that if it does occur it is not a dangerous precedent?

Mr. FLOYD. I would not contend it is conclusive, but it might be a strong reason why we should not disturb the existing law, already definite in its terms, and try some new experiment, until the evil that you complain of had actually occurred in a decision of the Supreme Court. The Supreme Court, by a change of the personnel of the court——

Mr. STANLEY (interposing). Might go back to its former interpretation.

Mr. FLOYD. Might go back to its former interpretation.

Mr. STANLEY. I do not believe that we should, by enactment, crystallize into law the dictum of Justice White—and that is what I consider it—that there is a reasonable restraint of trade, either by legislation or by judicial interpretation.

Mr. FLOYD. I would bitterly oppose that.

Mr. STANLEY. I would.

Mr. FLOYD. This is a different proposition.

Mr. STANLEY. Without using those terms we can make it so manifest that Congress and the people do not mean to tolerate this thing of reasonable restraint of trade that it would be impossible for that interpretation to be repeated.

I wish to call attention to this act. It not only provides that Congress shall not restrain trade in any degree, but——

Mr. FLOYD. Which bill?

Mr. STANLEY. The bill H. R. 11757. This act provides that:

All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other.

Then the act, or the sections referred to, will read, when amended, in this way:

A BILL To amend an act of July second, eighteen hundred and ninety, entitled "An act to protect trade against unlawful restraints and monopolies."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act approved July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," is hereby amended as follows:

Section two is amended by inserting in line three, after the word "monopolize," the words "in any degree."

Section four is amended by striking out, after the words "respective districts," in line five, the words "under the direction of the Attorney General," and by adding, after the word "premises," in line sixteen, the words "Any person who shall be injured in his business or property, or shall be threatened with such injury, by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in the district in which the defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

"All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted and for no other," so that said sections when amended shall read:

"SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize in any degree any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty

of the several district attorneys of the United States, in their respective districts, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Any person who shall be injured in his business or property, or shall be threatened with such injury, by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in the district in which the defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

"All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted and for no other."

Certainly you have not changed or weakened the act.

We all do admit that if the Supreme Court ever should decide that this, that, or the other actual restraint of trade was not injurious to the public and not unreasonable, they would be setting a precedent leading to inevitable injury and fraught with menace and danger.

Mr. MORGAN. Since the rendering in the decision in the Standard Oil case has there been a cessation, to some extent, of the formation of combinations in restraint of trade? Is not it the fact that practically since that time the formation of these combinations in restraint of trade have practically ceased? What has been the effect of the decision upon the acts of our business men?

Mr. STANLEY. If it had been appreciable, I have not been able to see it.

Mr. MORGAN. Can you think of any new combinations that have been formed?

Mr. STANLEY. Yes; Senator La Follette gives a list of several thousand.

Mr. MORGAN. Have they been formed since that decision was rendered?

Mr. STANLEY. Many of them have. That was three or four years ago. These various holding companies are formed every day.

Mr. MORGAN. Is it not a fact that a great many of these companies are going to the Department of Justice and are dissolving their concerns in harmony with the law as construed by the Attorney General.

Mr. STANLEY. I hear that.

Mr. MORGAN. Has not that been going on to a greater extent than ever before, since the rendering of that decision?

Mr. STANLEY. There are more of them coming now to the Attorney General to show just what they are doing and to get such terms as he may deem advisable, and I am the last man to criticize the Attorney General. I think it advisable that we should "beware of the Greeks bearing gifts."

Mr. MORGAN. Do you think the Attorney General has authority, under the law, to make those agreements outside of the courts' decisions and to arrange compromise agreements?

Mr. STANLEY. Certainly he can——

Mr. MORGAN. I do not mean——

Mr. STANLEY (interposing). I do not care to discuss the propriety of the Attorney General's acts.

Mr. NELSON. What specific authority has the Attorney General in the case of a large combination such, for instance, as the American Telephone & Telegraph Co. to agree that he will permit it to go on as it is, if it will not take over the other?

Mr. STANLEY. May I read you a little section of this act, and let that be my answer?

I take from the Attorney General by the terms of this act all exclusive authority over its operation, so that he has no more authority in that direction than any district attorney has.

Mr. NELSON. If he has such power, you are going to repeal it?

Mr. STANLEY. If I were the Attorney General—and I am glad I am not—I should prefer in every case to make a court record of every dissolution of a holding company. But I am not criticizing the Attorney General for what he has done or is doing.

Mr. FLOYD. Incidentally you have mentioned one matter, and I want to ask you a question in regard to that. You propose to amend the Sherman Act by taking all the authority existing in the Attorney General now to institute these suits. You take away from the Attorney General all authority vested in him now to institute these suits for the dissolution of the corporations, and you lodge it in the district attorneys of the respective judicial districts of the United States?

Mr. STANLEY. No; I would not do that.

Mr. FLOYD. You say section 4 is amended by striking out, after the words "respective districts," in line 5, the words "under the direction of the Attorney General," and by adding, after the word "premises," in line 16, the words:

Any person who shall be injured in his business or property, or shall be threatened by such injury by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in which defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

All evidence showing or tending to show that restraint was partial or that it was not undue or unreasonable shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other.

I understand from that that you strike out the authority of the Attorney General and invest it in the attorneys?

Mr. STANLEY. I will say, if you place that interpretation upon it, I would leave the Attorney General with the authority to institute proceedings, but I would not confine it to him.

Mr. MORGAN. Has the Attorney General any authority to institute proceedings himself under the present law? The Sherman antitrust law requires United States attorneys to institute the proceedings under the direction of the Attorney General.

Mr. STANLEY. Yes; under the direction of the Attorney General; a private party can not institute proceedings under section 21.

Mr. FLOYD. The district attorney has no authority to institute a suit unless he is directed to do so by the Attorney General, and the Attorney General enforces the law through the district attorneys. It seems to me you can give the Attorney General the same power of direction he has now, and give the district attorney authority independent of the Attorney General in case the Attorney General did not direct the suit.

Mr. STANLEY. I agree with you entirely, and the act should be so amended. In drawing the act it was my intention to give to the

district attorney, to take away from the Attorney General the sole power to institute such actions, but not to take away from him the power to institute as many as he may like.

Mr. MORGAN. I have a question I would like to ask you for information. Suppose there is an industrial firm in New York and another one in Oklahoma engaged in the same business. The firm in New York buys the product of the firm in Oklahoma, takes complete possession and runs the business. Suppose the New York firm, with offices in Oklahoma is doing business in Kansas, and that the Oklahoma firm is doing business in Kansas. Would it be a restraint of trade, and do you want to limit a transaction like that?

Mr. STANLEY. It is hard to answer those hypothetical questions.

Mr. MORGAN. Is it not a concrete illustration? As I understand it, you want to prohibit every contract that limits or restricts trade between two persons engaged in interstate commerce?

Mr. STANLEY. No, never.

Mr. MORGAN. Wouldn't that be a degree——

Mr. STANLEY (interposing). Would you punish a man for cutting a riding switch from a forest?

Mr. MORGAN. Suppose that a man said no man can cut any twig?

Mr. STANLEY. Then suppose he does do it?

Mr. MORGAN. Then I would punish him.

Mr. STANLEY. The law says, for instance, that a man shall not go over a bridge at a gait faster than a walk. Would you punish the man who goes any faster than a walk, the least bit faster than a walk, over a culvert?

Mr. MORGAN. Yes, sir.

Mr. STANLEY. Then you would read out of the law just what was intended to be in it?

Mr. MORGAN. It seems to me, logically, that is just what you are doing.

Mr. STANLEY. That is exactly what I am not doing. I am including all of them, and leaving it to the common sense of judges to pass trifling cases when brought into court.

Suppose you try with other things. Suppose you say you shall not steal unreasonably; you shall not commit an assault unreasonably; you shall not trespass upon a man's property unreasonably; you shall not go at an unreasonable speed over a bridge—do you not see what an impenetrable fog you would get into?

Mr. MORGAN. Should not the Supreme Court differ in putting this word "reasonable" in the law. Would you say it is to be left to the common sense of judges, the question, is that not what the Supreme Court did in their decision?

Mr. STANLEY. No, sir; instead of leaving it to the common sense of a jury or of a court—instead of leaving it to the common sense of a litigant, as it has done in acts forbidding any wrongful thing—they have tried to write into the law and say how far you can go without getting into forbidden territory.

It is not the rule. The rule is that only good things, only things which are commendable, shall be reasonably used. We are so constituted that the love of wife or child or the taking of sustenance must all be exercised reasonably.

Emerson has said that every faculty must answer for its use in life. We must be temperate in everything, we must be reasonable

in the use of legitimate things, but the vice of this act is that it attempts to provide for the reasonable use of an illegitimate thing.

Mr. MORGAN. There is where you are wrong, I think.

Mr. STANLEY. Monopoly is illegitimate. It is a form of larceny.

Mr. NELSON. I would like to bring out this fact, which seems to be overlooked. There is here a real emergency; the Supreme Court in two cases, the Standard Oil case and the Tobacco case, specifically interpolated into the law the word "unreasonable" which Congress had refused to put into the law, and they not only did that, but they practically reversed a long line of previous decisions, where the very question was whether certain acts were reasonable or unreasonable.

Mr. STANLEY. And made junk of them.

Mr. NELSON. That made the emergency immediate and important.

Mr. STANLEY. I agree with you. We can put it off. We can say if we want to that these people are going to voluntarily come and lay down their arms and give up this coveted power and we will wake up at our peril.

Take this question; that very question is discussed in the case of United States *v.* Standard Oil Co., in the decision of Justice Hook, of the United States Circuit Court, as reported in 173 Fed. Rep., at page 194, when he says:

> The true test to apply to a case under the first section is not whether the restraint upon competition imposed by the contract or combination in question should be regarded as reasonable or unreasonable, but whether it is direct and appreciable. Contentions of the reasonable and unreasonable are much too diverse to afford a stable, uniform rule for construing a law which contains no mention of those terms. So much depends upon the point of view, that it frequently happens that what appears to one to be wholly unreasonable is thought entirely reasonable by another. If the restraint is direct and appreciable, and not merely incidental to some contact having a lawful purpose, it falls clearly within the prohibition of the statute, and there is no room for further construction. There are many contracts which, in the days when the common law was forming, would have been adjudged contrary to public welfare, as being in restraint of the narrow trade of those times, but which, in a commercial age, like the present, have such a negligible effect in that direction as to be no longer evil within the meaning of the law. Their effect is so indirect and inappreciable that it is properly referable to the class de minimis, and it is not to be supposed Congress had them in view when it legislated to preserve freedom of competition in the broad field of interstate and foreign commerce. Vital principles, however, have not changed; the change is is merely in the conditions upon which they operate.

Mr. MORGAN. I have that decision from which you have just quoted. You take the reasoning of Justice White and Judge Hook; what Judge Hook there calls direct and appreciable restraint, is that not in reality the same thing, largely, as Justice White would claim to be what is not undue or unreasonable? In other words, is that not largely a difference of words?

Mr. STANLEY. Oh, no; there is a vast difference. You can easily enough tell when a stream is impeded, because you can see the thread of the current. You put a ligature about an artery, and you can tell when the artery is affected; it is appreciable when you can clearly see it. But an unreasonable impeding of the circulation is another question. It must depend upon the effect upon the health of the man. Is it an unreasonable restraint of trade? It must depend upon its injurious effects upon the broad field of commerce, and the minute you attempt to establish that fact in a suit against one of

these concerns you will find the full effect of that word "unreasonable."

(Thereupon, at 12 o'clock m., the committee took a recess until 1.15 o'clock p. m.).

AFTER RECESS.

Mr. STANLEY. Now, this effort to limit arbitrarily, the restriction upon monopoly, to such combinations as were not out of reason, as were not manifestly pernicious, is as old as monopoly.

The arguments were made to Queen Elizabeth when she first created these pernicious things. She stated that she had never granted the right to control the manufacture of any commodity, or its transportation, except upon such proof as appeared to her to conclusively prove that it was beneficial to the realm. In other words, that while restriants was manifest as it was bound to be where there was a monopoly granted, that it was not undue and unreasonable.

All of her monopolies were submitted to my Lord Coke to determine what were absolute restraints of trade, unreasonable and undue, and in which case they should be rendered void, and what restraints were commendable and reasonable and beneficial.

In passing upon that great question that great jurist, Lord Coke, attempted to take the monopoly of the manufacture of playing cards and the monopoly of coal and the monopoly of glass and the monopoly of soap and the monopoly of leather, and a hundred others, and to separate them into reasonable and unreasonable restraints, and after an exhaustive effort he abandoned the task, in utter and supreme disgust.

To quote his own language, and I wish to call your attention to that, "the end," said Lord Coke, "of all these monopolies," reasonable and unreasonable—

is for the private gain of the patentees; and although provisions and cautions are added to moderate them, yet it is mere folly to think that there is any measure in mischief or wickedness, and therefore there are three inseparable incidents to every monopoly against the commonwealth. First, that the price of the same commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases. Second, the incident to a monopoly is that after the monopoly is granted the commodity is not so good and merchantable as it was before, for the patentee, having the sole trade, regards only his private benefit and not the commonwealth. Third, it tends to the impoverishment of diverse artificers and others who before, by the labor of their hands in art or trade, had maintained themselves and their families and who now will of necessity be constrained to live in idleness and beggary. (9 Coke's Reps., p. 163.)

The result of this effort of Lord Coke to find a measure in mischief and to determine what is a reasonable and what an unreasonable monopoly was that on March 24, 1624, King James approved the celebrated statute of monopolies, and that act is more drastic, and if anything, more sweeping and more absolute in its terms than the Sherman Antitrust Act. That statute provided, in section 1:

All monopolies and all commissions, grants, licenses, charters, and letters patent to any person or persons, bodies politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using anything within the realm or walls, or of any other monopolies, and all proclamations, exhibitions, restraints, warrants of assistance, and all other matters whatsoever any way tending to the instituting or strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of the realm, and so are and shall be utterly void and of noneffect and in no wise to be put in execution.

Now, I wish to call your attention to this bill. I am sure you would not consider Mr. Littleton radical. In March, 1912, Mr. Littleton, who was a member of the Steel Investigating Committee, and also a member of the Judiciary Committee, said:

I would strike out section 4 of the present law, thus taking from the Department of Justice the exclusive power to bring action for the violation of law. I would make it law for any man whose business is damaged by unfair practices of another to bring an action in a court of competent jurisdiction for an injunction instead of leaving it solely to the inert Department of Justice.

I see no reason why a private individual who can bring an action under the seventh section can not also bring an action under the fourth section. I see more reason why a private individual should have a better right to prevent an injury than to collect damages after the injury has occurred.

Mr. FLOYD. In the bill prepared by the subcommittee we have a similar provision, giving the individual the right to bring suit the same as the Government under the fourth section of the bill, and we have also another provision making a decree of the Government——

Mr. STANLEY (interposing). I understand. That provision in my bill is taken from one of the bills reported by the committee. I have not gone into it, but I do not see exactly how you can make that effective without redrafting that portion of section 4 of the Sherman Act which provides that suits can only be instituted at the instance of the Attorney General.

Mr. FLOYD. You agree also, by the provisions of your bill, that the power ought not to be taken away from the Attorney General, but the district attorneys ought to be given the power independently?

Mr. STANLEY. That is it, exactly. I hope this bill will be reported, and, from what the members of the committee have said, I believe it will be. It has never been suggested that the law was too drastic as previously drawn, that the word "unreasonable" should be there.

The most that has been said is that we need not apprehend that their emasculation of the law by virtue of the decision in the Standard Oil case, and in the subsequent decisions, have tended to allay that alarm. It is not intended by any member of this committee, so far as I can see, that the law shall be emasculated, but that we have every reason to believe it is probably still intact.

It is the hope of every Member of Congress that the law will be subsequently interpreted as it was previously interpreted. Why not provide, then, that a restraint in any degree shall be contrary to the act? You certainly can not affect any of the terms now clearly understood. Why not, in addition, provide that the reasonableness or unreasonableness of the act shall be admitted for the only defensible purpose conceivable, and that is to show premeditation, as if it were a criminal case, and say that trade is not materially hurt. It is proper for a man accused of forming a contract in restraint of trade to show that the effect of it is not materially to injure and destroy competition. That is a matter for the consideration of courts in determining the extent of the man's guilt, whether he shall be fined or imprisoned, and the extent of the fine, if any. This bill is wonderfully elastic.

Mr. FLOYD. Will you permit me to interrupt you right there?

Mr. STANLEY. Yes.

Mr. FLOYD. Your amendment to section 2 contemplates the insertion of the words "in any degree"?

Mr. STANLEY. Yes, sir.

Mr. FLOYD. That is the only change in it?

Mr. STANLEY. Then it provides further that "all evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other," so that the sections, when amended, shall read in this way:

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize in any degree any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States in their respective districts to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determining of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining orders or prohibition as shall be deemed just in the premises. Any person who shall be injured in his business or property, or shall be threatened with such injury by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may bring suit in equity in any district court of the United States in the district in which the defendant resides or is found to prevent and restrain violations of this act and for other appropriate relief.

All evidence showing or tending to show that such restraint was partial, or that it was not undue or unreasonable, shall be admissible for the purpose of determining the quantum of damages or the character of punishment to be inflicted, and for no other.

Mr. NELSON. You put that in to show the legislative intent?

Mr. STANLEY. Yes.

The act is certainly not weakened in any way by the addition of those words. It in no way affects the substantive part of it.

I thank you, Mr. Chairman and gentlemen of the committee, for your very kind, patient, and courteous attention, and I hope you will give the bill favorable consideration.

(Thereupon, at 2 o'clock p. m., the committee adjourned to meet to-morrow, Saturday, Jan. 31, 1914, at 10.30 o'clock a. m.)

GEI... FEB26 1914

TRUST LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Parts 3 and 4.

STATEMENTS OF

HON. JEFFERSON M. LEVY, MR. F. C. PROCTOR, AND MR. R. L. BATTS.

JANUARY 31, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

	Page.
Statement of Hon. Jefferson M. Levy, a Representative from New York	109
Mr. F. C. Proctor	115
Mr. R. L. Batts	121

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
R. Y. THOMAS, JR., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
WALTER I. McCOY, New Jersey.
DANIEL J. McGILLICUDDY, Maine.
JACK BEALL, Texas.
JOSEPH TAGGART, Kansas.
LOUIS FITZHENRY, Illinois.
JOHN F. CAREW, New York.
JOHN B. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY G. DANFORTH, New York.
L. C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PARTS 3 AND 4.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Washington, D. C., January 31, 1914.

The committee assembled at 11.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

Present: Representatives Carlin, Floyd, McGillicuddy, Taggart, Peterson, Mitchell, Morgan, and Chandler.

The CHAIRMAN. Mr. Levy, the committee will be glad to hear you now.

Mr. CHANDLER. Mr. Chairman, I should like to say that I am obliged to leave the committee meeting, as I must go to the House; but I agree in general with the views of Mr. Levy.

STATEMENT OF HON. JEFFERSON M. LEVY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK.

Mr. LEVY. Mr. Chairman and gentlemen of the committee, I appear before you this morning in advocacy of the bill H. R. 12106, introduced by me, providing for the investigation of combinations, monopolies, trusts, and mergers, and to protect trade and commerce against unlawful restraints. Under my bill if six or more persons, citizens of the United States and resident therein, and of full age, are of opinion that a combination exists and that the prices have been enhanced or competition restricted by reason of such combination, to the detriment of consumers or producers, such persons may make application to any district court judge for an order directing an investigation into such alleged combination.

The CHAIRMAN. Do you not follow, Mr. Levy, somewhat the Canadian law on the subject of trusts in your bill?

Mr. LEVY. Yes, sir. That law has been in active force for some years in Canada, and they have been able to control the situation

there. The present Sherman law has been the cause of panic and disaster to the entire country; it has interfered with commerce and retarded our progress and advancement 20 years.

On May 8, 1911, which was about 10 days before the Supreme Court rendered its famous Standard Oil decision, I introduced into the House a bill (H. R. 9073) amending sections 1, 2, and 3 of the act of July 2, 1890, by an insertion of the word "unreasonable." At the time the bill was introduced I stated that if this amendment to the Sherman law were passed it would place it in the power of juries to determine each specific case, what combination would be reasonable or unreasonable in the particular case viewed in the light of the circumstances surrounding it, the nature and effect upon the public or the combination, and the inducements prompting the parties to enter it. The construction would be under the rules of the common law, which is the growth of centuries. The Sherman law, if amended as I proposed, would be following the common law in respect to conspiracies and restraint of trade and as further providing remedies for the punishment of such conspiracies, and would be of very great use in respect to preventing the continuance of illegal combinations and of punishing the parties thereto.

The fact that our able Supreme Court inserted in their Standard Oil decision the word "reasonable" is additional proof of its wisdom. This body—the great bulwark of our liberties—has shown the prescience by this decision to prevent the utter destruction of our commercial activities. The rights of property—the very foundation stone of civilization—would be trampled upon and destroyed without this just interpretation placed upon the Sherman law, and we would find ourselves bordering upon barbarism in using the weapon of the law as the force to deprive men of their vested rights.

If legislators, in their desire to pander to the violent demands of socialism or communism, pass laws not based on reason, then we should give praise in grateful reverence to our forefathers that they provided us an organization which would restrict such evil tendencies and call us back to the fundamental principle that all just laws framed in truth and justice must be based on right reason.

Under the law, before the Supreme Court decision, all the associations organized by farmers in the various parts of the country for the sale of local produce would have been declared illegal. If the court had decided the Standard Oil case without taking into consideration "reasonable restraining of trade," all classes of business would have been destroyed; all corporations and all firms would have been dissolved; and the business world would have been in chaos. In view of all this, in my judgment, every patriotic and reasonable citizen ought to be in favor of returning to the principles of the common law. The French Revolution was brought about, to a great extent, by such obnoxious and drastic legislation as some of our legislators to-day are proposing, and it is astounding that intelligent men should for one moment propose or agitate more drastic legislation than the present Sherman law. The bill introduced by me is a more liberal proposition and gives an opportunity to the people who are injured by combinations to recover damages. In Great Britain the common-law practice applies to all business interests, and why, then, should the business of this country be harassed by unreasonable propositions which can only injure trade?

I would like to read, for the information of the committee, an extract from a speech made by the distinguished ex-chief justice of the State of New York, Hon. Edgar M. Cullen, which I noticed in the New York Herald of to-day, this morning.

It is, a question of whether individual liberty is still to obtain in America. Nevertheless, unless I am utterly mistaken, there is now a strong tendency in courts, legislatures, and worst of all, in the people themselves, to disregard the most fundamental principles of personal rights. Judicial decisions are made, statutes are enacted and doctrines are publicly advocated which when I was young would have shocked our people to the last degree. In those days liberty was deemed to be the right of the citizen to act and live as he thought best, so long as his conduct did not invade a like right on the part of others. To-day, according to the notion of many, if not most people, liberty is the right of part of the people to compel the other part to do what the first part thinks the latter ought to do for its own benefit.

As I have stated, I think the Sherman law has been the cause of the increased price of commodities; for example, it has doubled the price of oil; it has put up the price of coal in my city some $2 a ton—the Sherman law and the Hepburn law together. And I believe that all this increase has arisen from legislation.

For instance, here is what it cost one railroad alone—the Pennsylvania Railroad; its yearly carrying charges imposed upon it by recent legislation, equal the interest on $32,000,000. Now, that is going on all over the country. In Seattle, when the Hepburn law was put in force, there was a coal famine; it put coal up to $18 a ton at the time. And the price has never come down to the level which existed before that law was passed.

Mr. CARLIN. Do you favor the repeal of the Sherman law?

Mr. LEVY. No; we can not very well go back to the common law, because we have the statutes in the States; but if Congress should adopt my bill, it would protect us. That is on the line of the common law principles; and it is along the line of this Canadian law, which is in force and which has been very successful. I have been in favor of this all the time.

I do not believe in imposing penalties upon business that are too severe. At present people do not know—they do not really comprehend what the Sherman law is. Only recently, some six or seven weeks ago, I had a conversation with the Attorney General on this same line of thought, and he said, "Well, everyone knows what the law is." I said, "I must differ with you there." He said, "The Sherman law has been in force 23 years, and the people have had an opportunity to understand it." I said, "Well, there is no lawyer who knows exactly what the Sherman law is." He said, "Well, I will advise the people on the subject." And he did. He came out in a statement a little later.

The principle I have advocated is, if the punishment is severe, let the parties go to the Attorney General, and let him point out——

Mr. CARLIN (interposing). Have you read the proposed interstate trades commission bill, Mr. Levy?

Mr. LEVY. No, sir; I have not.

Mr. CARLIN. Well, that bill gives all the powers of investigation to the interstate trades commission and makes it advisory to the Attorney General—somewhat along the lines of your bill.

Mr. LEVY. Yes. Well, I originated—in fact, when the great panic came on during President Roosevelt's administration I went to see the President in relation to it. I said, "Why not grant an amnesty and explain to the people what the Sherman law is?" He said,

"That is a good idea. You go up and see Mr. Hepburn in the House and tell him about it." And I saw Mr. Hepburn, and Mr. Hepburn said, "Well, I will make a speech upon the subject." And he did make a speech, and business and trade began to go on again. The confidence of the public was restored.

The whole theory this past year has been based upon the question of securing the confidence of the public more than anything else. I think to-day if you will pass the resolution which I have heretofore offered in the House, in relation to withdrawing the suit against the United States Steel Corporation, why, you will have 500,000 more employees at work in this country. There has never been a more disastrous investigation than that investigation which went on in the case of the Steel Trust, because it threw many hundreds of thousands of people out of employment. And business is just coming into life again, because the President of the United States understands the situation, and how to bring us out from under this cloud of uncertainty and distrust which has enveloped us. That is the whole situation.

These are my views, gentlemen of the committee. If there is any further information I can give the committee, I will be very glad to do so. Of course, you will understand that I am very largely interested in the subject, because the city of New York is the greatest manufacturing city in the world. I will just read you a few statistics showing the enormous interests involved in that city. Of course, it is hardly necessary, as the members of the committee are familiar with the facts, but I would like to have it go in the record.

The metropolitan district of New York embraces 616,928 acres, of which 183,555 acres lie within the city proper. The population of the metropolitan district of the city of New York in 1910 was 6,674,000; and it is to-day about 7,500,000, or about 14 per cent of the population of the whole country.

Mr. TAGGART. Do you mean 14 per cent or one-fourteenth of the population?

Mr. LEVY. One-fourteenth of the population of the United States. That is why New York is so predominant.

Mr. CARLIN. Just what do you mean when you say that it is "predominant"?

Mr. LEVY. I mean it is always to the fore, and always leading in progress in everything. For instance, in New York, in the metropolitan district, there were, in 1909, 31,782 manufacturing establishments, which gave employment to 948,706 persons. During the year, they paid out $607,755,267 in salaries and wages. Of the persons employed, 789,174 were wage earners. Of course, these figures have greatly increased since that time. These establishments turned out products valued at $2,970,143,382, to produce which materials costing $1,710,324,660 were utilized. The value added to those materials was thus $1,259,813,722. New York is the greatest manufacturing city in the world. Are there any other questions the members of the committee would like to ask me?

The CHAIRMAN. Do you think you can adapt this act to provide for the investigation of combines and monopolies, trusts and mergers, the Canadian act, from which you say your bill is largely taken——

Mr. LEVY (interposing). Yes, sir; it is somewhat taken from that act; it is not entirely the same.

The CHAIRMAN. The Canadian act assented to on May 4, 1910—do you think you can make the provisions of that act which you have embodied in your bill applicable to conditions in the United States?

Mr. LEVY. I think I could, with the amendments which your committee can suggest. Now, there may be a question whether the persons damaged should not have to go to court to have a jury decide as to the amount of their damages. I leave those questions to your committee. My bill is a mere suggestion to your committee, and you can correct it as you deem proper; that is my idea. I do not want to claim the bill as being entirely my own; I had just as soon have it go out as the bill of the Committee on the Judiciary. All I want to do is to ease up business and have the confidence of the public restored. That is the situation.

Mr. FLOYD. Mr. Levy, Mr. Stanley appeared before our committee yesterday, and he very strenuously contended that the Supreme Court have already written the word "unreasonable" into the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. Do you agree with that contention?

Mr. LEVY. Yes, sir; I think they have construed it in that way.

Mr. FLOYD. Well, will you tell us what is the necessity of any direct legislation on the subject?

Mr. LEVY. Well, I think if you take this bill that I have proposed——

Mr. FLOYD (interposing). As I understood you, you said that you had introduced a bill; and I am not familiar enough with that to know whether you would put the word "unreasonable" into the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. Have you a bill here in which you propose to do that?

Mr. LEVY. That was at the last session of Congress, and before the decision of the Supreme Court.

Mr. FLOYD. The decision in the Standard Oil case. In other words, you think, in view of the decision of the Supreme Court of the United States in the Standard Oil case, that there is no necessity of adding that word to the text of the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. And you propose now this Canadian system as a modification of that?

Mr. LEVY. Yes, sir; and one reason for that is because the Sherman law gives no relief to the people damaged by the combination, where my bill does give them relief.

Mr. FLOYD. Well, the Sherman law, section 7, provides that anybody injured under the provisions of the Sherman law may obtain damages.

Mr. LEVY. It does in a way; but it is not as direct as this proposition, because under my bill there is a commissioner appointed by the President, and there are boards of investigation, appointed after investigation by the court in the regular channel—the Secretary of Commerce then appoints this board, which determines whether the law has been violated; and for the first offense the guilty parties are fined the amount of damages suffered by the persons applying for the investigation, and the second time they are punished as in the case of a misdemeanor. That is my theory. I think this law would be more liberal to the people than the present law.

Mr. CARLIN. The difficulty with your bill is that it is unconstitutional as it is drawn.

Mr. LEVY. Well, that is the reason I say I shall be glad to have amendments by the committee. I drew the bill up hastily, more for the benefit of the public and for the benefit of your committee than anything else, with the idea that your committee would look into the subject and correct it. And I think some other officials have looked into the subject also. My bill is for the purpose of trying to bring the uncertainty in the public mind to an end—the uncertainty which any lawyer would have to-day, so that if anyone should come in and ask him any question arising under the Sherman law, he could not answer it with certainty.

Mr. MORGAN. Under your bill, you provide that any six persons can bring a suit?

Mr. LEVY. Six persons can bring a complaint.

Mr. MORGAN. Yes, a complaint. Well, let us take the United States Steel Corporation, for example, doing business all over the United States.

Mr. LEVY. Yes, sir.

Mr. MORGAN. Now, in every place where there is a judge—and there is one in every locality—any six persons might combine together and bring a complaint against that corporation: is that not correct?

Mr. LEVY. Yes, sir.

Mr. MORGAN. And that company might therefore have 10,000 suits pending against them before this board or commission, each one brought by a separate set of six persons.

Mr. LEVY. That would be prevented by the commissioner, who would be appointed by the President of the United States, by and with the advice and consent of the Senate, and would be under the authority of the President; and he would be the one who would have the power to perform the duties provided for in this act, and recommend the appointment of board of investigation; and when these six people came in their complaint would be acted upon; and if any more people should afterwards come in against the same company, he could say, "An investigation is going on now," and they could come in before this board of inquiry which had been appointed, you see?

Mr. MORGAN. And whoever introduced the proceeding first—your idea would be that the whole thing would depend upon that proceeding?

Mr. LEVY. Yes, sir. I do not say that my bill is perfect at all; but I say that this committee might make it perfect. It would be something that would relieve the people, who are at the present time uncertain as to the provisions of the law. And I claim that the whole effect of the law has been to increase the price of commodities in every way.

But I think that your legislation here is in a fair way to correct that; that is my idea. I think the record of our party in this Congress has been good. You will hear the Members on the other side of the House talking about bad times. Well, we are going to have good times now, because we are going to give the people an opportunity to have prosperity. And I believe that what this committee will do will help toward that end.

(Thereupon, at 11.45 o'clock a. m., the committee adjourned until Monday, February 2, 1914, at 10.30 o'clock a. m.)

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, February 2, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Gentlemen of the committee, Senator Sheppard, of Texas, is here this morning, and he has two of his constituents who wish to be heard on the matter of holding companies. They want to give their views as to what would be correct legislation in regard to that branch of the so-called trust question. We will also be glad to hear from Senator Sheppard if he desires to say anything.

Mr. SHEPPARD. I merely want to present Mr. Proctor and Mr. Batts and say that the committee may rely on anything they say.

STATEMENT OF MR. F. C. PROCTOR, OF BEAUMONT, TEX.

Mr. PROCTOR. I will try to present the matter as concisely as possible. I am connected, as general counsel, and have been for some nine years, with an oil enterprise. Its history, I think, demonstrates that some character of business enterprises are required and compelled to adopt the holding-company form of organization, and that it is entirely lawful and not in violation of our antitrust laws at all. In brief, the history of this enterprise is this: In 1901 the originators of it found oil on the coast of Texas——

The CHAIRMAN (interposing). Have you given the name of your company?

Mr. PROCTOR. I will give it. There are several corporations in the enterprise, but it is generally known as the Gulf Oil Enterprise. In 1901 they found oil on the coast of Texas and they began to produce oil. They found that they did not have an adequate market for it in its crude shape and that it was necessary for them to go into the refining business. Their oil-producing company had as broad powers as Texas law permitted; that is, simply to produce oil and sell the production. They wanted to make an investment, which ultimately resulted in several million dollars, to refine oil. Their producing company could refine the oil which it produced, but it did not have the power to buy oil. This necessitated the creation of another company by exactly the same people, which was the Gulf Refining Co., with power to buy and refine oil and sell the refined products. They went into this business, which was successful, and naturally they wanted to enlarge the trade and went to the near-by State of Louisiana. Louisiana has a license tax law which levies 1 per cent upon the gross receipts from sales by foreign oil companies, but it does not apply to domestic oil companies.

Our competitors in Louisiana were exempt from that law, one because it was a domestic corporation, the Standard Oil Co., of Louisiana, and the other because—although it was a Missouri corporation—it had been admitted to do business in Louisiana prior to the passage of this license tax law, and under a statute which gave it equality with other domestic corporations. We were therefore compelled, in order to do business in competition with our competitors, to create a Louisiana corporation for that purpose. In other words, we could not sell oil in competition with them when we were subjected to a burden which they were not subjected to, and that

burden, as you can well see, might amount to a very large sum when the capital is turned over frequently during the period of a year. This consequently made necessary a third corporation. The oil in Texas began to play out and we were required to go to Oklahoma to get oil and to build a pipe line there for that purpose. That pipe line had to go across Indian lands and Congress had given to the Secretary of the Interior, and to the Secretary of the Interior alone, power to grant rights of way over Indian lands. The Secretary's regulations were that these rights of way would only be granted to pipe-line companies proper and not to producing or refining oil companies. We could not go over these Indian lands with a pipe line except by compliance with these regulations, and that meant the organization of a pipe line company. So we now had four companies, and that condition continued until Oklahoma was admitted as a State of the Union.

Under its constitution the power of condemnation for rights of way is conferred upon domestic pipe-line corporations but denied to such foreign corporations. Consequently our pipe-line company, which was a Texas creature, and which had built a pipe line into Oklahoma, was in a situation where it could not exercise the power of eminent domain to reach a new oil field. It was essential to the enterprise that we be in a position to reach a new oil field and consequently had to have this power of eminent domain. That necessitated the creation of an Oklahoma pipe line company, and that made five corporations we had to build up. Then there came the problem of financing the project. A good many million dollars had to be borrowed for the purpose of constructing this pipe line, with the building of the necessary tanks for a reserve supply of oil, and so forth, and the trouble was that no one of these corporations could offer adequate security. In Louisiana the company owned the Louisiana property; the refining company owned the refinery; the producing company owned the production or wells and the pipe-line company the pipe lines, and so forth; but none of these were good security in themselves; they were good security only in conjunction with the other complements of the main business. No one of these corporations had the right to issue joint bonds with the others and under the law no one had the right to guarantee the bonds of the others.

The problem, therefore, was in fixing upon some plan whereby men would be willing to loan money upon the whole enterprise; and after the most careful thought which the management, with my advice, could give it, we found no plan except that of a holding company.

Mr. CARLIN. Where was the holding company?

Mr. PROCTOR. In the only State where it was possible, New Jersey. Every other enterprise we have is the creature of the local State except the New Jersey company. Incidentally, I may say we are doing business in New Jersey, so far as that is concerned, but the holding company referred to is purely and simply a holding company and with no operating powers at all. It was brought into being for the purpose of financing the project. It exchanged its stock for stock and bonds of the different branches of the business which I have mentioned and issued its own bonds and pledged the stock and bonds of the other companies as security.

Mr. CARLIN. What was to prevent your company from taking out one charter and doing all of these things under one corporate name?

Mr. PROCTOR. Well, I will put it to you in this way. In the first place we could not have gotten such a charter in Texas. In Texas the oil business is seemingly divided into fragments. You get one company to produce oil, another company to refine oil, and another company to transport oil through pipe lines—three separate organizations.

Mr. CARLIN. And under the laws of Texas they can not be one organization?

Mr. PROCTOR. No, sir; they can not do anything in Texas except that for which chartered. We could not go elsewhere and get a corporation with all of these powers, because when it came to be admitted to do business in Texas it could only have the powers of one corporation—that is, a foreign corporation can be admitted to do business in Texas only to the extent that a domestic corporation can do business. If we had gone somewhere and gotten one corporation with all of the adequate powers to really conduct one enterprise, one result would have been that in Louisiana, for instance, we would have been subjected to this license tax of 1 per cent. Suppose, for illustration, we had created a Louisiana corporation for that purpose, namely, to conduct the entire business; then we would have been in this situation, that we could not have had the power of eminent domain in Oklahoma.

Mr. CARLIN. Do not the statutes of Oklahoma confer the power of eminent domain upon foreign corporations under certain conditions?

Mr. PROCTOR. No, sir. The constitution of Oklahoma prescribed this, that the power of eminent domain should only be granted to domestic corporations. They did, however, include a provision that the legislature might amend such clause within five years and, incidentally, I never knew of any other constitution that could be amended by the legislature, but in Oklahoma that right exists. At the last session of the legislature, about six months ago, they passed a constitutional amendment which provides that a foreign corporation, upon meeting the requirements which may be imposed by the corporation commission of Oklahoma, should have the power of eminent domain. That is a very recent thing, and I do not know what the corporation commission of Oklahoma has indicated as essential in that regard. So I can not answer you that it is absolutely impossible for a foreign corporation to have the power of eminent domain in Oklahoma, but at the time we created our corporation it was absolutely impossible.

The CHAIRMAN. I would like to know how it is that a holding company could not be chartered in Texas, because the scheme you have outlined, as I understand it, is not contrary to its antitrust law and is not contrary to our antitrust law.

Mr. PROCTOR. It is not; it is simply the absence of a statute in that regard. Our antitrust law is like all other antitrust laws; the spirit of it is this, that it prohibits any form of combination which works a restraint of trade and stifles competition, and here there never was any competition stifled because there was never any competition to stifle. You see, the same individuals brought into being these successive corporations, and they were forced by the laws to do it. There never was any competition between them; there never was a time that they were competitors, and there never was the acquisition of plants or facilities of others or anything of that sort. It was simply the same people, with the same money, carrying out the same enter-

prise. I am certain there are many, many illustrations in the United States of the same thing.

Mr. FLOYD. If I understood your explanation in regard to Texas law, it was that the oil business in Texas, under the antitrust law, had to be divided up; that a company had to specify and limit its operations to the particular things specified.

Mr. PROCTOR. The antitrust law has nothing to do with it, but such is a result of the Texas general incorporation laws.

Mr. FLOYD. And I inferred from what you said that it would not be proper, under the corporation laws of Texas, to include as the objects of the company the production of oil and at the same time the selling or refining of it?

Mr. PROCTOR. It could not be included in the same charter?

Mr. FLOYD. That is the way I understood you.

Mr. PROCTOR. There would have to be distinct corporations——

The CHAIRMAN (interposing). And each corporation would discharge a separate function?

Mr. PROCTOR. Yes, sir.

The CHAIRMAN. And therefore they are not competitors?

Mr. PROCTOR. Not at all.

The CHAIRMAN. And there is no combination in restraint of trade?

Mr. PROCTOR. No, sir; it is a legal situation. In the State of Texas there has never been any thought that it is violative of the policy of our laws or anything of that sort. It is simply a situation which is forced upon us in order to do the different branches of the business. If you ask me why the law is that way, I will answer that it may be because of taxation. We have had for considerable periods of time different forms of taxation as respecting pipe-line companies and producing companies. We now have a form of taxation which affects a producing company differently from a refining company. The purpose of Texas in requiring separate charters may be that the State taxing authorities may properly tax the different branches of the business.

Mr. FLOYD. I understood you to say before the hearing commenced that you had a brief on the subject, and if so, I would suggest that you have it incorporated in the record in connection with your remarks.

Mr. PROCTOR. It is substantially what I have said, except that it is probably more concise.

Mr. FLOYD. Well, I would be glad if you would hand it to the stenographer and let him print it in connection with your remarks.

Mr. PROCTOR. I just want to say that it is not our purpose in appearing before the committee to ask any modification or change in the law; nothing of that sort. I just thought this would give an illustration of many instances which I believe are present in our industrial life where holding companies are absolutely necessary and absolutely lawful, and that holding companies are the only means by which some enterprises can do business in a good many States. Our enterprise is doing business in most of the States east of the Mississippi and in several States west of it, and it has succeeded. It is well recognized, as the result of a great many governmental investigations and in the trade generally, as an honest competitor of the Standard Oil companies, and we are simply at a loss to know what we would do if there was any prohibition against holding companies. I do not know how we could grow or even go on.

Mr. FLOYD. In that connection I want to bring out clearly this fact: As I understand it, your company is a competitor of the Standard Oil Co. and in no way allied with it?

Mr. PROCTOR. We are absolutely connected with them in no way. As you gentlemen understand, investigations have been made by the Bureau of Corporations and the Department of Justice, and I think there is a great deal of testimony on that subject in the Standard dissolution suit. However, that is a fact which I state to you positively. It is absolutely independent of the Standard Oil Co. and has never been allied with it. That is recognized in the trade and is recognized as the result of these investigations.

Mr. PETERSON. I notice this in the antitrust law of Texas:

When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act.

Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

Seeming to indicate that that might be done if it was not in restraint of trade.

Mr. PROCTOR. Absolutely; yes, sir.

Mr. PETERSON. And you are not doing business in restraint of trade, as I understand?

Mr. PROCTOR. Not at all, sir. However, I have very carefully considered the section you read, and it prohibits the acquisition of stocks in two concerns where it results in the restraint of trade or results in the stifling of competition. But, as you will note, it inferentially permits it to be done; a fair inference is that it is entirely permissible and legal where it does not do those things. The policy of the State is further indicated by an act of the legislature in which the State permits the organization of a holding company to control stocks of corporations doing business in other States. We could hardly assume that Texas would claim the right to create a holding company to control stocks of companies doing business in New Jersey and at the same time deny to New Jersey the right to create a holding company to hold stocks of companies in Texas. I think the policy is indicated in that regard.

Are there any other questions?

The CHAIRMAN. No; and we will now be glad to hear from Mr. Batts.

(The brief filed by Mr. Proctor is as follows:)

FEBRUARY 2, 1914.

To the chairman and members of the
Judiciary Committee of the House of Representatives:

In the President's antitrust message suggestion is made that holding companies should be prohibited. We believe the President had in mind that the holding company is frequently used as a device to violate the antitrust and monopoly statutes, and that his suggestion really means that Congress should consider it is advisable to enact legislation to more efficiently correct such abuse. We do not wish to be understood as here suggesting any modification of the present antitrust laws which prohibit the use of the holding company device, as all other devices, for the creation of a monopoly or destruction of competition in interstate and foreign commerce. Our proposition is simply that there should be no absolute prohibition of holding com-

panies. Because of restrictions imposed by State legislation either for the purpose of raising revenue or for the carrying out of some purely local policy, enterprises whose operations extend to many States are compelled to adopt the holding company form of organization as the only lawful means of growth.

Many such instances are presented in our industrial life. In fact this applies to nearly all lines of industry in which products are shipped from one State in bulk and not in original packages and are distributed and sold in another State, thus requiring the enterprise to do a local business in the latter. An illustration of the foregoing is the experience of one enterprise which is engaged in the oil business.

Because oil is found in only a few localities it is obvious that the greater part of our country must be supplied by shipments from such favored places. Frequently the crude oil is transported to another State, refined, and the refined product sold therein or shipped to other States for sale, but the same observation applies if the oil be refined in the State in which it is produced and the refined product be shipped to and distributed in other States. These products, either crude or refined, are transported in bulk (only a very small part being sold in original packages), and the distribution and sale of such products constitutes a doing of local business in the State to which they are shipped. This is the only economical way of doing such business and is that which the competition of others forces, with the result stated that the business of distribution and sale of the refined products in each State is wholly subject to regulation, taxation, etc., by the State in which it is done. (General Oil Co. *v.* Crain, 209 U. S., 211.)

"The Gulf Companies" is the oil enterprise referred to. In 1901 the originators of such enterprise found oil on the coast of Texas. They incorporated in said State an oil company with powers to produce oil and sell such production. Under the laws of Texas no greater powers could be obtained for that corporation, nor could any corporation of another State be admitted to do business with any broader powers. Because there was an inadequate market for their crude-oil production they determined to refine their oil and sell such refined products. Their producing company could refine the oil it produced, but had no lawful power to *buy* oil for refining. They expected to make ultimately a refinery investment of several million dollars, as was in fact done. No such investment could safely depend upon receiving its crude-oil supply from one source, which might become exhausted, and hence it was essential that this refining business should have the power to *buy* oil from others. Accordingly, these same people incorporated in Texas another company with power to buy and refine oil and sell the refined products.

Meeting with success and desiring to enlarge their market, they naturally began to sell oil in the adjacent State of Louisiana. The latter imposes a license tax in favor of the State and the parishes or municipalities aggregating 1 per cent of the gross receipts from sales of oil, both crude and refined, by foreign corporations, but this tax is not imposed upon domestic corporations. (Wolff's Revised Laws of Louisiana, sec. 7 of act 127 of 1898 and sec. 15 of act 171 of 1898.) Of course such a tax would impose a very large burden, since 1 per cent would be taken each time that the capital used in Louisiana was turned over. One of our competitors, the Waters-Pierce Oil Co., was not subject to such tax because, although a Missouri corporation, it had been admitted to do business in Louisiana on terms of equality with domestic corporations prior to the passage of such license-tax law. Another, the Standard Oil Co. of Louisiana, is a corporation of the latter State. Obviously, our people could not compete on such unequal terms, and they were therefore compelled to create a Louisiana corporation to transact the business of the enterprise in that State.

Later the oil production in Texas greatly decreased, and to protect the very large investment which had been made in the refinery, ships, tank cars, oil stations, etc., as also a large trade which had been built up, these people found it necessary to construct a pipe line to the Oklahoma fields to get oil. This pipe line had to cross Indian lands. Under an act of Congress the Secretary of the Interior alone could grant the right of way thereover. The regulations of the department and insistence of the Secretary was that such right of way would only be granted to a corporation assuming the obligations of a common-carrier pipe line. Neither the producing nor the refining company had such powers, and hence it became necessary to create a pipe-line company, and the same was incorporated in Texas.

A difficult financial problem then presented. The construction of this pipe line, with its necessary tankage and reserve supply of oil, required several million dollars, which had to be borrowed. Neither the producing company nor the refining company, nor the latter's Louisiana adjunct, nor such pipe-line company could offer the adequate security for this loan, because each owned but a part of the property of the entire enterprise, and such part was not a good security except in connection with the other complements of the entire enterprise. Neither did these corporations have power to issue any joint bonds or to guarantee the payment of each other's bonds. Yet the enterprise,

as a whole, was ample security. The only practicable and lawful mode of financing such project, and that which we were forced to adopt, was the organization of a holding company, which exchanged its stock for the stocks and bonds of the other companies and issued its own bonds for the amount required, securing payment thereof by pledge of the stocks and bonds of such other companies, thus giving the parties who advanced the money a virtual lien upon the entire enterprise.

Another chapter is that after the construction of such pipe line Oklahoma was admitted as a State. Its constitution gave the power to condemn for rights of way to pipe-line companies incorporated in Oklahoma, but denied such power to those elsewhere created. The danger therefore presented that our pipe-line company, created in Texas, might not be able to reach a new oil field. This made necessary the creation of an Oklahoma pipe-line company to do business in that State.

Other like difficulties arising from local legal requirements could be mentioned, but we think the foregoing is all that is necessary to show:

First, that the adoption of the holding company form of organization was not voluntary, but forced upon the enterprise in order to comply with local laws; and,

Second, that each successive corporation was brought into being by the same people to conduct a part of the same enterprise. There was no merger with nor acquisition of a competitor. It was not *combination* to stifle competition, because there was never any competition between these corporations to stifle. It was mere *growth*.

The enterprise referred to has prospered; its capitalization is large, but it is engaged in the business in which both economy of operation and the ample resources of its competitors would make success impossible without ample means. But its capitalization is honest, and each dollar thereof represents a full dollar of value received. The enterprise is selling oil in most of the States east of the Mississippi, and in several west of the same. These States contain fully 60 per cent of our people, all of whom we think receive some benefit from this competition. In the many governmental investigations this enterprise has been found free from any Standard Oil connection, and it is recognized in the oil trade as one of the two largest, if, indeed, not itself the largest competitor of such companies.

We know that the holding company is a device frequently adopted to violate the antitrust law, but the foregoing exhibits that it is likewise capable of use in an entirely innocent manner. In this case, and many others, it is indeed the only available means for growth of a competition. We can not control, and should not even attempt to influence local policies, but must meet the legal requirements of the States in which we operate. Of course, a national incorporation act may give relief to such a situation, but all of us must admit that there is grave doubt of the power of Congress under the commerce clause of the Constitution to give adequate relief when the latter must practically go to the extent of regulating what has heretofore been considered a purely local business done in a State. Besides, such a measure would carry with it a governmental supervision over all business, a step which we think the country is not now prepared to take and as yet the absolute necessity therefor has not been demonstrated.

We earnestly insist that the prohibition against holding companies should not be absolute. If made absolute, it presents the problem: How can legitimate enterprises grow which operate in many States? In fact, how can this particular enterprise maintain its present position as an important factor in the rapidly increasing competition in the oil trade of the United States?

We, therefore, respectfully submit that in legislation against holding companies, the prohibition should be restricted to the acquisition by them of stock in competing concerns, whereby an existing competition is destroyed. The prohibition thus limited would reach the evil in the use of such device, and would not hinder the growth of legitimate enterprises.

Respectfully submitted.

F. C. PROCTOR, *Beaumont, Tex.*,
R. L. BATTS, *Austin, Tex.*,
Counsel for the enterprise referred to.

STATEMENT OF MR. R. L. BATTS, OF AUSTIN, TEX.

Mr. BATTS. I also represent the Gulf Co.

The CHAIRMAN. What is your address?

Mr. BATTS. Austin, Tex. This matter has been covered by Mr. Proctor, except perhaps I might make a further explanation of the laws of Texas. There is no general power of incorporation in Texas; the purposes for which incorporation may be had are specifically

indicated in about 71 paragraphs, indicating directly what each corporation may be formed for, and there being an inhibition against the formation of corporations for more than one of these purposes. That will explain why at least two of these corporations were formed——

Mr. SHEPPARD (interposing). Is that a constitutional inhibition or a statutory inhibition?

Mr. BATTS. A statutory inhibition. There is simply an absence of authority to incorporate except for those specified purposes. A holding company is not prohibited, but no provision is made for it. It is simply the absence of a provision on the subject.

I may say, with reference to the antitrust laws, that it is perfectly well understood in Texas that these oil corporations that are in competition with the Standard Oil Co.—that is to say, the Gulf Co. and the Texas Co.——

Mr. CARLIN (interposing). What was the name of the other company?

Mr. BATTS. The Texas Co.

Mr. CARLIN. There was another one, was there not, some time ago?

The CHAIRMAN. The Waters-Pierce Co.

Mr. BATTS. That was a subsidiary company of the Standard Oil Co.

Mr. CARLIN. What connection did you have with that company, if any?

Mr. BATTS. I represented the State in its litigation with the Waters-Pierce Co., and I think I know the policy of the State in regard to its antitrust laws. The formation and business of the Gulf Co. has been under constant supervision, and in Texas the antitrust laws have been enforced with great vigor. I think it can be said that no large concern that has at any time violated the antitrust laws in Texas has escaped litigation in the State. But there is not the slightest suggestion that this gulf oil enterprise is violating the law.

Mr. CARLIN. What finally happened to the Waters-Pierce Co.?

Mr. BATTS. It was put out of business. The State collected about $1,800,000 in penalties and it was put out of business and not permitted to do business in the State.

Mr. PETERSON. Has it been reorganized and is it doing business in any form?

Mr. BATTS. It is in business outside of Texas.

Mr. PETERSON. I mean, in the State of Texas.

Mr. BATTS. No; not so far as I know. The physical properties were sold and a new concern organized. I do not know what connection the stockholders of the Waters-Pierce Co. have with the new concern, but I feel sure that the Standard's connection was absolutely destroyed.

Mr. FLOYD. If I understand you, your connection with that case was as a representative of the State of Texas?

Mr. BATTS. Yes, sir.

Mr. FLOYD. In prosecuting the case?

Mr. BATTS. Yes, sir.

Mr. FLOYD. And the companies you represent never had any business relations with the Waters-Pierce Co.?

Mr. BATTS. None whatever.

Mr. FLOYD. Or with the Standard Oil Co.?

Mr. BATTS. No. The firm of which I was a member, Gregory & Batts, was especially employed by the State in the litigation against the Waters-Pierce Co.

I have nothing further to say, Mr. Chairman, unless some one desires to ask questions, which I will be glad to answer if I can.

Mr. SHEPPARD. I want to state that Mr. Batts is the editor of the Annotation of the Texas Statutes, which is accepted as the standard work on that subject throughout the State, and he is peculiarly qualified to speak regarding Texas law.

Mr. PROCTOR. We are very much obliged to you for this opportunity of being heard.

(Thereupon the committee adjourned.)

28273—PT 3-4—14——2

GENERAL LIBRARY
FEB 26 1914

TRUST LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 5

STATEMENTS OF

MR A. S FRISSELL
MR. J. R. MOOREHEAD
MR. F. R. STEBENTHAL
MR. JAMES F. FINNERAN
MR. C. F. NIXON
MR. JOHN TRAINOR
MR. PETER BECK

FEBRUARY 3, 4, AND 5, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Statement of:	Page.
Mr. A. S. Frissell, New York	125
Mr. J. R. Moorehead, Lexington, Mo	132, 190
Mr. F. R. Stebenthal, Eau Claire, Wis	166
Mr. James F. Finneran, Boston, Mass	167
Mr. C. F. Nixon, Leicester, Mass	180
Mr. John A. Green	191
Mr. John Trainor, Baltimore, Md	199
Mr. Peter Beck, Harvey, Ill	218

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
R. Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	L. C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 5.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 3, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. We are now ready to hear you, Mr. Frissell. Please give your name, address, and occupation.

STATEMENT OF MR. A. S. FRISSELL, PRESIDENT OF THE FIFTH AVENUE BANK, NEW YORK, N. Y.

Mr. FRISSELL. My name is A. S. Frissell; I am president of the Fifth Avenue Bank, New York City.

The CHAIRMAN. You may proceed in your own way and give us the benefit of your experience in regard to the matters which are under consideration by the committee.

Mr. FRISSELL. I think all I need to do is to read you a paragraph from a speech made by then Gov. Hughes, who, you know, opposed the combinations of the insurance companies and who much improved our banking law. It will give you his idea on the point of inter-

locking directors. Gov. Hughes made this speech at Youngstown in 1908. He said:

When, however, we consider these other remedies that are proposed for trusts, we find ourselves journeying in a land of dreams. Again the magician of 1896 waves his wand. At a stroke difficulties disappear and the complex problems of modern business are forgotten in the fascination of the simple panacea.

The first suggestion is that the law could prevent a duplication of directors among competing corporations. However advisable it may be to have independent directorates of competing corporations, it would seem still more important to have independent stockholders, for the majority of the stockholders of a corporation choose the directors.

If a law were passed preventing the duplication of directors it would easily be evaded in the selection of men who would represent the same interests. The most ordinary experience shows that it is not necessary to serve on a board of directors in order to control its proceedings.

That is really all I have to say. The difference between a director who advises and helps the officers of a bank to serve the customers and stockholders and a director who bosses the directors, and insists upon the improper use of bank funds to be used for individual purposes, is that the second director can do so if the officers are weak enough or are dummy directors. In a bank managed properly the officers will be helped by able, intelligent directors. I think you will find it especially true in the smaller towns where these men are interested in so many things, interested in almost everything in a small town or city, and where they have to be interested in those things in order that the enterprises may prosper. They are selected for almost everything that comes up.

Mr. CARLIN. Is it your idea that our bill does not go far enough?

Mr. FRISSELL. It goes too far.

Mr. CARLIN. We do not touch the subject of stockholders.

Mr. FRISSELL. A director can not be in two banks——

Mr. CARLIN. The argument of Gov. Hughes suggests going further than we have gone, and controlling in some way the stockholders.

Mr. FRISSELL. That is a question I can not go into. This matter is a remedy that will not help you.

Mr. CARLIN. You think our bill goes too far?

Mr. FRISSELL. I do not think it meets the point. Let me take our bank as an illustration. The Importers and Traders' National Bank is a conservative bank of 50 years and more standing, and some of the directors living in the neighborhood thought they would start a bank, and so they took some of the men from the Importers and Traders' Bank, and the cashier became the president of the little bank up town. They served without pay at first. The first president served without pay for eight years, and the second president served without pay for eight years, and I have been with them for 38 years. As time went on, a good many of our employees—our messengers and other employees—left our bank and went down town and became more important even than I in my position am, and afterwards we took them in as directors.

As the members of our board died off we took in the sons, who were important men down town. These men have been of much help to us, and there is nothing wrong or irregular about it. They only help us, and they do it for the interest of the bank all the time. That is about all of my story.

Mr. CARLIN. I do not exactly understand your position. You say we have gone too far?

Mr. FRISSELL. I am not saying what you have done.

Mr. CARLIN. You propose a measure which goes much further than we do.

Mr. FRISSELL. I beg your pardon.

Mr. CARLIN. I thought you read Gov. Hughes' remark with approval.

Mr. FRISSELL. He said you could not do anything unless you could get the stockholders, and you could not succeed in that in the measure you propose.

Mr. CARLIN. How do you propose getting hold of the stockholders?

Mr. FRISSELL. I do not say anything about that; it is a pretty hard question.

Mr. CARLIN. You would not have read it to this committee unless you approved of it.

Mr. FRISSELL. I read what was said about interlocking directors; I do not say anything more about it.

Mr. CARLIN. Do you approve of Gov. Hughes' remark or not?

Mr. FRISSELL. Yes, I do. I have here a list of the directors, some of them important men down town, and most of them would be taken away from us by that bill, and it would be very hard on us.

The CHAIRMAN. This bill does prevent the interlocking of bank directors.

Mr. FRISSELL. Of a bank, under the new law, with a State bank or trust company.

The CHAIRMAN. You do not think that is a desirable thing to do?

Mr. FRISSELL. Certainly it would upset us to a large extent. Of course, we could go on, and I think it might work very well in a great many of the smaller cities and towns of the United States. You asked me yesterday what the remedy was, but that is too much for me.

Mr. MCCOY. Do you think there have been any evils resulting from the interlocking of directors of banks, trust companies, and insurance companies?

Mr. FRISSELL. Oh, yes; I have read the articles in Harper's Weekly about the Money Trust, and, of course, I am familiar somewhat with the Pujo committee investigation, but that will not be affected by this law.

Mr. MCCOY. Can you suggest any way of getting at those who, for the sake of the argument, we will assume, indulge in wrong practices, in interlocking directorates, and letting go those who have interlocking directorates but have not indulged in any bad practices?

Mr. FRISSELL. Gov. Hughes was not wise enough; neither am I.

Mr. MCCOY. You think there is a wrong, but you can not suggest a possible remedy?

Mr. FRISSELL. I think there are remedies for all wrongs, but this is a remedy which will not cure the evil.

Mr. MCCOY. What do you sugest as a remedy?

Mr. FRISSELL. I am not wise enough to suggest a remedy. I do not see how you are going to keep people from holding stock, and when a person holds stock I do not see why he can not vote on it.

Mr. McCoy. We have the power, so far as the Federal bank system is concerned, to say who shall be directors, and to say how the directors shall be elected. Would you suggest a remedy along those lines, getting at the stock rather than the director who has been elected by the stock?

Mr. Frissell. I have not studied the question, and I certainly could not present any views on it offhand. It is a very important subject.

Mr. Carlin. What is the capital stock of your bank?

Mr. Frissell. $100,000.

Mr. Carlin. And what is the amount of your deposits?

Mr. Frissell. Between fifteen and sixteen millions.

Mr. Carlin. You have a list of names there of members of the board of directors of your bank whom you say are members of the directorates of other banks?

Mr. Frissell. Of banks and trust companies.

Mr. Carlin. Will you give those names to the reporter to be published in the record?

Mr. Frissell. I think the members of our board of directors who are also directors of other banks and trust companies are as follows: John D. Crimmins, 40 East Sixty-eighth Street; James G. Cannon, president of the Fourth National Bank; Thomas S. Van Volkenburg of P. Van Volkenburg & Co., 17 Battery Place; William H. Porter of J. P. Morgan & Co.; Henry P. Ickelheimer, of Heidelbach, Ickelheimer & Co., 49 Wall Street; Howard C. Smith, of Hathway, Smith, Folds & Co., 45 Wall Street; Cornelius N. Bilss, jr., of Bliss, Fabyan & Co., 32 Thomas Street; Alfred E. Marling, of Horace S. Ely & Co., 21 Liberty Street.

Mr. Carlin. What is the surplus and undivided profits in your bank?

Mr. Frissell. Over $2,000,000; the book value of the stock is $3,500,000.

Mr. Carlin. The capital stock of your bank is $100,000, and that has an actual value of $3,500,000?

Mr. Frissell. It sells above $4,000.

Mr. Carlin. $4,000 a share?

Mr. Frissell. Yes, sir.

Mr. Carlin. The amount actually paid in was $100 a share?

Mr. Frissell. $200. We paid in $100,000 surplus.

Mr. Carlin. How old is your bank?

Mr. Frissell. It was started in 1875.

Mr. McCoy. There was a series of years in which you did not pay any dividends?

Mr. Frissell. Fifteen years. We have never bought nor sold any stocks. We have done nothing but a conservative sort of banking business. We have done nothing in the way of speculating or underwriting or anything of that sort.

Mr. Carlin. You do not pay the officers any salaries—that is, the president?

Mr. Frissell. We did not pay the president any salary for many years.

Mr. Carlin. Do you pay the president a salary now?

Mr. Frissell. Oh, yes; I am paid a salary. I have to support myself on my salary.

Mr. NELSON. I would like to inquire whether you live in New York City?

Mr. FRISSELL. I do.

Mr. NELSON. You do not believe, then, that preventing the interlocking of directors will effect any change in the ownership of the banks which are working together now, do you?

Mr. FRISSELL. No; because you see, the stock—unless you can get at the stockholders you can not prevent the stockholders from electing the directors.

Mr. NELSON. Will they be affected if that law is passed?

Mr. FRISSELL. I do not know.

Mr. NELSON. What will they likely do? Will they elect a dummy board, or what will they do?

Mr. FRISSELL. You mean in our concern?

Mr. NELSON. Generally; in your concern and others?

Mr. FRISSELL. In our concern, we are not in the system, and that allows our directors, where their interests are greater elsewhere—I mean to say the directors in a national bank will have to go out of our bank, if their bank continues as a national bank.

Mr. CARLIN. If those directors do withdraw because of their relations with the national banks, what Mr. Nelson wants to know is whether you will elect real or dummy directors?

Mr. FRISSELL. I do not know what we will do; I can not promise what we will do.

Mr. NELSON. Let me use some other word than dummy. Will any of the gentlemen who own stock be represented by proxies?

Mr. FRISSELL. I do not know. I do not see how they can.

Mr. NELSON. If they are represented by proxies, will they not still own the stock?

Mr. FRISSELL. I am only the president of the bank, I am not the bank. We would naturally get in new men, but I would rather not do that; I want to keep the organization working.

Mr. NELSON. Are you quite familiar with the banking system in New York?

Mr. FRISSELL. Yes.

Mr. NELSON. Of late it has been said that Mr Morgan and various men representing the Morgan firm have resigned from the directorship of various other banks.

Mr. FRISSELL. They have.

Mr. NELSON. Do you think that that means that the Morgan firm will no longer control any other business institutions?

Mr. FRISSELL. I do not think I can express an opinion about what their control will be of the banks and trust companies. I do not know anything about it. I do not know. It is perfectly easy for them to if they want to, because all they have to do—they do not hardly need dummy directors if they have the stock.

Mr. CARLIN. You do say that so far as your bank is concerned it drives these men out of your board of directors?

Mr. FRISSELL. Yes.

Mr. CARLIN. It would likely bring new men in?

Mr. FRISSELL. Which is a very unhappy thing to have to do.

Mr. CARLIN. You do not mean to say that you would bring just dummies into your board of directors?

Mr. FRISSELL. I have not gone as far as that.

Mr. CARLIN. Let us understand you. Would your stockholders elect men to your board of directors who are mere dummies, or will they elect men who are to be real directors?

Mr. FRISSELL. I rather imagine that, considering the consensus of the present administration, they will be apt to do what the administration finally asks them to do. They have always done that. They have always given their proxies to the administration, and I do not see any reason they should not continue to do that.

Mr. CARLIN. I do not think you understand my question. When you come to elect new directors of your bank, as you say you will have to do, is it your opinion that the stockholders of your bank will elect dummies or real directors?

Mr. FRISSELL. It is possible we may reduce our board.

Mr. CARLIN. Then, if you reduce the board you would not reduce it to a board of dummies?

Mr. FRISSELL. No; we would keep in the directors who would stay with us, you know.

Mr. CARLIN. How many of your directors are not directors in national banks?

Mr. FRISSELL. Perhaps five.

Mr. CARLIN. How many directors have you on your board?

Mr. FRISSELL. Eleven.

Mr. CARLIN. Of the five directors who are not directors in national banks, how many of them are directors in railroads?

Mr. FRISSELL. I do not think any of them are directors in railroads.

Mr. CARLIN. Then, if this law goes into effect, you will only have those five directors who will be qualified to serve on the board?

Mr. FRISSELL. Five or six. Some of them may stay with us instead of going with the other people.

Mr. CARLIN. You would not seriously say, Mr. Frissell, that when you come to fill the vacancies occasioned by the resignation of these men that your stockholders would elect dummies in their places?

Mr. FRISSELL. I do not say that; I have not thought the question out.

Mr. MCCOY. Mr. Frissell, do you have any particular line of business into which most of your loans go?

Mr. FRISSELL. We loan on everything.

Mr. MCCOY. Is there any one line of business—say, the woolen or cotton or any other particular line of business—into which a large proportion of your loans go?

Mr. FRISSELL. We buy paper all the way from Portland, Me., to Portland, Oreg., and paper of dry goods, groceries, and other leading lines, leather and things like that.

Mr. MCCOY. Do your deposits and your surplus go principally into buying commercial paper or to make loans to depositors?

Mr. FRISSELL. The business is coming more and more uptown, so we are loaning a larger proportion to our customers. We still loan to houses on merchandise stocks, and buy a good deal of paper.

Mr. MCCOY. So far as the loans are concerned—the loans which you make to your customers who are moving up in your direction, on Fifth Avenue—is it not perfectly possible to get into the directorate those who are in business on Fifth Avenue, in that neighborhood, and to get from them just as sound business advice so as to

extend credit safely as you can get from a downtown bank director who is also in your bank?

Mr. FRISSELL. I will say very frankly that when the president and vice president and cashier of the Importers & Traders Bank were directors all I had to do in getting any proposition to them—if it seemed to be a sensible proposition—it would go right through the board. The people who are bankers on the board, if they agree on anything it goes right through the board. They are all good bankers, and that is all that is necessary; the rest of the board will follow us naturally.

Mr. CARLIN. Most of the directors are dummies now, in effect, if that is the case.

Mr. FRISSELL. I think you will find that in every board there are two or three leaders, and unless there is some reason to object they generally do what those men recommend. Naturally, in the banking business they follow——

Mr. CARLIN (interposing). You have 11 directors, and under your present system, when two or three of the leaders say a thing is all right, the balance acquiesce?

Mr. FRISSELL. I do not hardly think it goes as far as that. The officers make the loans, and they meet at certain times and criticize anything that is bad. There is a good deal of paper taken on approval and discussed in the board.

Almost all the loans to customers are made offhand. Only the very doubtful loans go before the board. A good deal of paper is bought on approval by the board, and the matter is discussed in the board as to whether or not it is good paper. Very rarely anything gets as far as that that is not good, unless it is put on purpose before the board.

Mr. MCCOY. The Importers & Traders Bank is a big bank?

Mr. FRISSELL. Yes.

Mr. MCCOY. It keeps in very close touch with credit ratings all over the country. That is a fact, is it not?

Mr. FRISSELL. Yes.

Mr. MCCOY. Assuming that no director of the Importers & Traders Bank could be on your board——

Mr. FRISSELL (interposing). There is only one director on there now.

Mr. MCCOY. Assuming that no one of them could be, do you think there would be any practical impossibility in getting his advice or that of the Importers & Traders Bank, regardless of the directorate?

Mr. FISSELL. I have said we have had a good many clerks who go out from us and who are now officers in other banks, and I am on very good terms with all of them. If you are on the board you know that the consultation over things is of much more value than talking with them one by one.

Mr. MCCOY. Aside from your peculiarly favorable situation, because you have sent so many men out into these other banks, is it not true that people in the banking business do get from each other information, and properly?

Mr. FRISSELL. Oh, I have no doubt the officers could run a bank without any directors, if you want to put it that way.

Mr. CARLIN. They do that very largely anyway, do they not?

Mr. FRISSELL. Oh, no; I do not say that.

Mr. CARLIN. My question is, Do they not do that very largely?

Mr. FRISSELL. I do not say that.

Mr. CARLIN. Do you deny that?

Mr. FRISSELL. Yes; I think I will deny that.

The CHAIRMAN. Banks could not be operated without directors having a voice in their management and having active participation in the management of their affairs without violating the law?

Mr. FRISSELL. Our directors are there whenever there is a meeting.

Mr. MCCOY. Is the Fifth Avenue a State bank or a national bank?

Mr. FRISSELL. A State bank.

Mr. CARLIN. Do you pay your directors for attending the meetings?

Mr. FRISSELL. Yes.

Mr. CARLIN. Is it a nominal sum?

Mr. FRISSELL. Not very nominal; it has been $20.

The CHAIRMAN. Is there anything further you desire to say, Mr. Frissell?

Mr. FRISSELL. No, Mr. Chairman; I think that is all I care to say.

The CHAIRMAN. We are very much obliged to you for appearing before us.

AFTER RECESS.

The committee reassembled, pursuant to taking recess, at 2 o'clock p. m.

The CHAIRMAN. Representative Borland, of Missouri, desires to present some gentlemen who will address themselves to the subject of the proposed legislation.

Mr. BORLAND. Mr. Chairman and gentlemen of the committee, I asked permission of the chairman of the committee to present to the committee the secretary of the National Retail Merchants' Association of the United States, representing the country merchants and the retail merchants, and give them an opportunity to present their views relative to trust legislation. I do not intend to make any argument myself; I am going to leave these business men to the questioning of the committee. The head of their delegation is Mr. John R. Moorehead, of Lexington, Mo., who is the national secretary of the Retail Merchants' Association of the United States. I will now introduce Mr. Moorehead to the committee.

STATEMENT OF MR. J. R. MOOREHEAD, OF LEXINGTON, MO., NATIONAL SECRETARY OF THE RETAIL MERCHANTS' ASSOCIATION OF THE UNITED STATES.

Mr. MOOREHEAD. Mr. Chairman and gentlemen of the committee, I want to thank Mr. Borland particularly for having arranged this hearing to-day and to thank the chairman and the members of the committee for granting us the privilege of being heard.

Last Saturday I had notice that the Committee on Interstate and Foreign Commerce of the House of Representatives would hear us in relation to the trade commission bill to-morrow, but upon arriving here we found that you would hear us to-day in regard to these bills, but we find ourselves here with only a few of the delegation

we expect to be here to-morrow, and the various retail interests are not represented in as large numbers as we expected.

I am here to speak for all of them, however, having come out of a conference recently held in which I was directed to come to Washington and present, not only to the committees of the House and Senate but to the President of the United States as well, a brief containing the ideas and facts appertaining to the little business man of this country as he is affected by the antitrust laws; and as these laws affect him so do they affect the smaller communities of the country which are feeling the pressure and the strain of depopulation and the trend of business away from the country and the country towns to the city, into the hands of larger aggregations of capital.

In order to be brief, I have here the statement which I had the honor of presenting to President Wilson on the 19th of January last, and to which he gave a most respectful hearing, and inasmuch as it is short and contains the argument which I have to present to this committee, I am going to ask your permission to read the statement which I presented to President Wilson.

The CHAIRMAN. That statement will be included in the hearings in its entirety, and I believe the members of the committee have also been furnished a printed copy of it, and I think it would save your time and be just as well if you incorporate it in the record at this point without reading.

Mr. MOOREHEAD. Very well, then, Mr. Chairman, I will do that.

(The statement referred to is as follows:)

Mr. PRESIDENT: I come here as a retail merchant from a small community and also bear a commission from the representatives of some 250,000 retail merchants, the greater part of whom are in business in like communities to my own, in every State in the land.

I come as the result of a conference held in Chicago on December 18 last, which consisted of representatives from retail associations of butchers, grocers, jewelers, druggists, plumbers, hardware dealers, implement dealers, lumber dealers, and coal dealers.

While these represent a great army in themselves, there are at least a million and a quarter retail merchants, all told, in the country, the great majority of whom are in business not for the purpose of making money, or more money, but for the purpose of making a living for themselves, their families, and their dependents, and I believe that what I shall say in behalf of those I represent directly, will have the approval of all, among whom organization to no great extent exists.

Those who have sent me here have been encouraged to take this step by what you have recently had to say in your book entitled the "New Freedom," in which you have set forth in the last chapter thereof more fully than I can hope to do, just what the small business men and the smaller towns of the country are now in most need of. And I take this occasion, first, to thank you in their behalf for the very explicit stand you have taken for the small business man, and the smaller community and will ask your indulgence if I call your attention to some of the conditions existing to-day, and affecting the business interests of those I represent.

RETAILERS ARE LEADERS IN UPBUILDING.

I believe you will agree with me when I say that the retail merchants of the many thousands of communities in our country are in the forefront of every good work and purpose which tends to the building up of the communities in which they live, in the direction of better schools, better home conditions, better churches, better roads, and a better place in which to live. They are law-abiding at home and can not afford to be otherwise, and have no more desire to violate a State or national law than a city ordinance.

I have said that there are a million and a quarter, at least, of this class of our citizenship. If each firm were represented only by a single person with the average of five to a family, there would be six and a quarter million people in the immediate families of this great army of retail merchants. But there are many more dependent upon each for a livelihood under the head of clerks and assistants in every way, which would certainly more than double the sum mentioned. In other words, there must be at least 12,000,000 or 15,000,000 of our population directly dependent upon and drawing their support, in whole or in part, from the revenue derived from the distribution of merchandise through the small retail merchants, and every one of them is a consumer.

And yet we know that this is but a part of those who look to the retail merchant directly and indirectly for a means of support. They pay more taxes, more insurance, more rent, and contribute more in proportion to the value of their property than possibly any other class in our country.

There is no cause presented in any community, anywhere, in which the retail merchant is not the first upon whom a demand is made, and he is more often than not the leader of the movement in every good work that goes to make a town and the surrounding country prosperous and contented. This is the only class of our citizenship that really lends any great sum of money without interest, and solely upon personal security. I refer to that universal practice of extending credit to the consumer. The great department stores and mail order houses may contend that this is bad business, and an expensive method of distribution. Yet, what would the people in and about every community in the land, farmers, laborers, and every other class of our people do in time of stress, when the strike is on, when the crop fails, and they have no ready money with which to buy for cash? Their credit is not good at such or any other time with the mail-order houses.

If we take the number of post offices in the country as a criterion, there are nearly 60,000 communities in this country from the small hamlet to our greatest city.

The population as given by our last census upon its face is somewhat misleading and merits more minute investigation. The total population as given by our last census is, in round numbers, 92,000,000, 53.7 per cent of which is given as rural and 43.3 per cent as urban, or, in round numbers, 42,500,000 urban population and 49,500,000 rural. This total urban population includes the population only of 2,405 of our cities and towns, all towns of less than 2,500 being counted as rural. There are 11,785 incorporated towns of less than 2,500 population in this coutry containing 8,000,000 people counte das rural which in all fairness should be added to the urban population as given in the census. This accounts for only 14,000 towns and cities. It does not account for the remaining 45,000 unincorporated towns and villages, and it does not account for the great suburban population surrounding our great cities, and to a more or less extent, every community in the land. There certainly must be at least eight or ten millions more of our population thus accounted for, which, added to the 42,500,000 urban population, as given in the census, and the 8,000,000 living in the 11,784 towns, makes practically 60,000,000 of our 92,000,000 population as being actually urban. In other words, one-third only of our population can fairly be said to be rural. Of these 60,000,000, 20,300,000 live in the 50 cities of our country containing more than 100,000 population each, and 40,000,000 in all of the other small cities, towns, and villages.

RURAL HOME MARKET LARGER THAN CITY MARKET.

I call your attention to this fact to show you that there are twice as many people living in the smaller cities, towns, and villages as live in our 50 great cities.

I call your attention to this fact for the further purpose of showing you that the home market of our farming population, living about these smaller cities and towns, is just twice as great as the city market, and yet we hear much that would lead one to believe that all of the people in this country to be fed by the producers on the farm are to be found in the great centers where the high cost of living seems now, more than ever, the one great thing talked about and to be considered. Yet, the fact is, as I have tried to show you, the home market of the farmer is his largest and best market, right at his door where he can bring his produce every working day in the year and sell it to the customer direct, without the intervention of any middleman whatsoever, and secure

therefor every cent without any profit of commission to any middleman whatsoever. And yet, Mr. President, for the last 10 or 20 years there has been carried on in this country such a campaign of advertising, education, misrepresentation, and denunciation of the retail merchants, who are neighbors, friends, and kinsmen of the people of the towns and surrounding country, to such an extent that there are millions of our people to-day, particularly living upon our farms, who will not buy a dollar's worth of the necessities required from the home merchant if the cash is at hand to send away from home. They never give us a chance to supply their wants and are generally ashamed to admit they do this thing, which in itself shows the practice is wrong. It is a fact that only when the crop fails, or when the strike is on and the cash is gone, do many millions of our population ever think of patronizing the home merchants.

This campaign has great resources behind it. It has brought a great revenue to the metropolitan and farm press and magazines of the country. We are not here criticizing these great agencies for taking the business, but we do desire to enter a protest against those who employ these agencies to advertise their wares where they are not known, and where they have no interest, pay no taxes, support no schools, give nothing to charity, and have no interest whatever in the prosperity of any local community, and at the same time fill their advertising with denunciations of the home merchant and misstatements and falsehoods as to the superiority of their own wares over those that might be purchased at home.

Much has been said in recent years about the encroachment of big business upon little business, and the concentration of great power in our banks.

I believe I am speaking for everyone whom I represent to-day when I say that they are more than rejoiced that you and your administration and the Congress that is assembled here at this time are attempting to do much along the line of curbing the greed of great aggregations of capital in monopolizing not only the business but the money of the country. You and all with you are to be congratulated that the country has received with approval your work and labors in the direction of tariff revision and currency reform.

MENACE OF DISTRIBUTION MONOPOLY.

There is, however, we believe another tendency to monopoly in this country to which the press and public men of the day have given scant attention. I refer particularly to that very evident disposition on the part of great aggregations of capital to monopolize the distribution at retail of merchandise of every kind. The agencies and powers at their command are unlimited. To indicate to you that this is their goal, I quote from a letter recently written by a mail-order house to a citizen of Iowa, as follows:

"We think and know that if you will give the matter consideration, you will agree with us that a business of this kind, conducted as this one is, is the ultimate solution of the high cost of living, and we do not think it would mean the ruination of the small towns, or any reduction in land values, to have trade centralized. On the other hand, we are under the impression that it would be a benefit to all. The retail merchant at the present time belongs to that great class of middlemen which are neither producers or consumers.

"We know that the time will come when, except on a very small scale, the middleman will be entirely eliminated. You will naturally ask, 'What will become of the country merchant?' In reply to this question we would say that he would become a producer, perhaps be a farmer, or engage in some other business that would mean that he would give something to the community instead of taking away from it, as he now is."

I submit to you, Mr. President, that if the head of any of the great trusts of this country should so declare its policy toward the public, that the press of the country would display such a piece of news under double headed columns, and the editorial pages would burn with condemnation at the proposal of such a cold-blooded, premeditated policy.

As you have said, and to which we can not object, we care not how big business may become, but when business becomes big by denunciation and misrepresentation of the little business man it is wrong in every sense, and when fully understood, we believe, will not have the approval of the great body of our people. There is no question, Mr. President, but what to-day the lines are being formed for a monopoly and control of the retail business of the country, first, and more particularly, through the great mail-order houses.

Much has been said relative to the interlocking directorates and the financing of great enterprises in Wall Street, but nothing has appeared particularly to date, directing the attention of the country to the fact that the great mail-order houses of to-day are, practically ever one of them, financed in Wall Street. The chairman of the board of directors of the greatest mail-order house in the country sits as the president of one of our New York banks, and two of the others who are bidding for the trade of the entire country have recently been financed by the much discussed and talked about J. Pierpont Morgan & Co.

To such an extent has the business of these great enterprises increased, some by hundreds and even thousands per cent, that our factories, wholesale and jobbing houses are subject to their dictation. They force discrimination against the small dealer.

FIRST COST NOT ALL THE COST.

The plea set up by theose who control these enterprises is that by their great purchasing power and concentration of distribution the necessities of life are distributed more cheaply to the consuming public. I am here to deny, when we take into consideration every phase and every result of this method of merchandising, that this is true. There is something besides first cost to the consumer in considering this problem of distribution. Assuming for the sake of this argument that merchandising along these lines will not result in depreciation of quality and will foster cheapness of price, yet are we not compelled to take into account many other phases of the equation? If cheapness were the only element entering into a problem of this kind, laying aside all other results growing out of the concentration of business into a few hands, it is in your power and in the power of Congress further to cheapen the necessities of life of every kind and character. In considering the revision of the tariff you took into account the fact that many articles of consumption would be cheapened by a reduction. If taking off a part of the tariff would cheapen some article, following that line of argument, you would have been warranted in removing all tariff duties whatever. You might, with the approval of Congress, cheapen many things in this country if you would enact a maximum instead of a minimum wage law. Certainly cheap wages would mean cheaper products to the consumer. But cheap wages, I am sure, is not the only thing sought for, because there are many other things to be taken into consideration when we come to deal with the matter of reduction in wages to our laboring people.

Congress and State legislatures might cheapen many things by abolishing the eight-hour law and laws regulating the hours of work for girls and women. Many things might be made cheaper if we should repeal our immigration laws and permit a horde of Chinese, Japanese, and Hindus to come into our country and take the place of our working men at half the wage. If cheapness is the only thing to be desired, why should our good State of California be so solicitous about the influx of the Japanese?

I claim, Mr. President, that every argument that could be brought against putting our country on a strictly free-trade basis; against making a maximum instead of a minimum wage for our laborers; against requiring our men and women to work more than eight hours; against repealing our immigration laws, is a valid argument against the concentration of the distribution of merchandise, at retail, into the hands of great mail-order houses and department stores to the elimination of the million and a quarter retail merchants, independent business men, their own masters, owning and controlling their own business, helping to build up and foster every good work in the 60,000 communities of our land.

OTHER ISSUES ARE INVOLVED.

I submit there are other questions and issues involved in such a possibility besides that merely of cheapening of merchandise as the one thing to be desired. Even if the claims which we have heard for so long from these aggregations of capital were in any sense true, which we do not admit, especially when made at a sacrifice of quality and without any service rendered such as is rendered every day by every retail merchant in every community, they could not be justified upon other valid grounds.

What are the moral, the social, the religious, the political, and the economic problems involved in the possibility of the concentration of the distribution of our great centers through the department stores and mail-order houses? Only to touch upon these questions, might we not ask how would this country be benefited morally by the concentration of business and population to a greater

extent than is now taking place in our great cities? Would it be a good thing for anyone to have merchandise retailed in the large city by employing women and girls at meager wages, rather than through the country merchant who is his own master?

Much has been said about the decline of the country church. It is time somebody was demanding to know about the decline of the town church. What about the social conditions that are going to be crowded upon us, even to a greater extent than they now exist owing to the concentration of population in our great cities? How much improvement is there going to be in the politics of the country when the cities become greater than all of the balance of the country? What of the many economic problems that are going to be put up for solution by the city, by the State and the Nation as a result of this very patent concentration? And, if the policy of the mail-order house is to continue and prevail, how shall we hope to cope with these many-sided questions which are now already a burden not only to the cities themselves, but the State and the Nation as well?

The towns of the country have already started down hill. The business men whom I represent all see this as they have never seen it before. They are discouraged and even desperate as to the prospects for the future, not only of their business, but of the communities in which they live. The boy and the girl early become restless in anticipation of the time when they shall go to the city to engage in business, and the outlook for keeping the boy not only on the farm but in the town and away from the great crowd of the city is anything but reassuring.

LOSSES IN RURAL POPULATION.

I have spoken of the decline of the town. I have recently made some investigations as to the decline of the towns in nine of our principal States and with the exception possibly of a few of our western States, where immigration has been greatest, I believe the same conditions prevail throughout the land. The result is as follows, as shown by the census of 1900 and of 1910:

State.	Number of towns.	County seats.	Number of counties.
Wisconsin	346	25	71
Missouri	540	41	114
Iowa	564	40	99
Indiana	639	22	92
Michigan	677	27	83
New York	746	16	61
Illinois	788	28	102
Ohio	1,136	11	88
Pennsylvania	1,520	7	67
Total	6,956	217	777

Here we have in 9 States 6,956 towns which have lost population, notwithstanding the fact that the population of the whole country increased in the period mentioned 21 per cent.

There is another feature to this table which emphasizes the situation, and it is that out of the 777 county seats in these 9 States, 217, or nearly 28 per cent of them, have lost population, notwithstanding the fact that the county seat is in many ways the center of most of the activities of the county unit along the line of politics, courts, and collection of taxes, and in other directions.

And, strange to say, this tendency of the decline of the towns is greatest in the richest and most thickly settled parts of the States. Seeing these tendencies to eliminate the small retail merchants and substitute therefor the larger mail-order house, it became apparent to those who had long been engaged in association effort amongst the retailers that some concerted action should be taken looking to the stemming of the tide that not only has set in against them but threatens to engulf the country towns. This finally brought together some two years ago representatives from 35 States, representing more than a quarter of a million merchants, to consider collectively what policy should be pursued and what action, if any, should be taken. After two years of effort and cooperation, bringing us to this day and hour, when it seems to be your purpose and that of

Congress to amend the Sherman antitrust law, I have come to present the case of not only the small business men but every man of every kind who is interested in his preservation, in the preservation of the home trade and the home town, which, we believe, carries with it the preservation of many of our American institutions.

SHERMAN LAW DEFEATS ITS OWN PURPOSE.

We believe that the Sherman antitrust law was enacted to curb and hold in check big business. We do not believe that it was ever intended that this law should be used by big business to intimidate and prevent small business men from joining hands in defense against a stronger competitor; yet this is the actual situation as we find it to-day.

I make bold to assert that, notwithstanding the most diligent and painstaking investigation on the part of the Bureau of Corporations, nothing has been found touching the activity of retail associations, especially in the Western States, where this investigation has been most searching, that would indicate an attempt to control prices or the fostering of any policy inimical to the public weal. They have not denied that they have made common cause against what they believe to be a common enemy, and it has not been shown that they have ever varied from the truth. They have freely admitted upon all occasions that they are doing everything they believe to be legal and proper to protect themselves, their families, and their communities against an aggression that was indeed threatening their very existence. In doing so, they may have overstepped the law, but if they have it is because they have had no one in authority in the government of the States to whom they could go and submit any proposition at any time as to whether or not their acts were violative of the antitrust law.

If it is lawful for a commercial agency to report me, as a retailer, to the entire commercial world for having failed to meet a note promptly, pay a debt, or for having given a mortgage or a deed of trust, should it be any less our right and privilege to make a similar report to our membership relative to the manufacturer, jobber, or wholesaler from whom we have purchased goods and for which we have paid, should we ascertain that he has sold merchandise to us at one price, to a mail-order house at a less price, and to the consumer at another price? Wherein would be the injustice in giving the widest publicity to an act of this kind, which we can not construe as being otherwise than double dealing, un-American, and unfair in every sense? The honest manufacturer, jobber, or wholesaler in this country (and there are few who are not) would scorn the adoption of any such secret methods. The great majority of them prefer to be open-handed, open-minded, and ever ready to give a square deal to those from whom they have derived their greatest support and prosperity. But, unfortunately, there are bushwhackers in business, as well as snitch lawyers and quack doctors in the professions, and it would seem that the present antitrust law as applied to the little man in business is putting a premium (thought not intentionally) upon this method of merchandising.

Believing that if any action is taken at this session of Congress looking to amendments to the Sherman law, that these amendments will be the law of the land for years to come, I have come here to present the side of the retailer in order that he may have consideration at your hands and in the make-up of anything that may be added thereto.

You may ask if we have a remedy. I can only suggest to you that in the absence of any particular policy which Congress may desire to adopt, that at least the little man in business be permitted, under any changes that may be made, to make a common defense against a competitor who shows by his actions that his ultimate aim and purpose is to destroy the little business man, and along with him the community in which he dwells.

Would it be too much to make it specific that it would not be a violation of the antitrust law to tell the truth, and to disseminate such truthful information through the agencies of the association, and further, that it should not be unlawful to give the widest publicity to the business policy and purposes of all persons, firms or corporations doing an interstate business?

Heretofore when we have wanted to know the meaning of the law, we have been told that it is not the province of the Department of Justice to interpret the law, or to give legal opinions, but to enforce the law. Uncertainty is the watchword. We have no desire to be lawbreakers, but we do desire and plead

for a law that at least our own lawyers can tell us what it means. It were better that we should be disbanded altogether than to be subjected to suspicion by the public and possible prosecutions by the Government at all times.

SPECIAL COMMISSION SUGGESTED.

We have already seen a change in the attitude of our great transportation companies brought about through the supervision by the Interstate Commerce Commission. The day of rebate and discriminations in favor of special interests and favored commercial centers has passed. Secrecy has ever been the cloak under which big business works oppression. The Interstate Commerce Commission has been the medium through which abuses in one branch of our commercial life have been corrected, and the great agency in this direction has been publicity. I am here as a representative of the small merchants of this great Nation. We ask that the antitrust law be amended and among other things, it be provided that a commission be created and this to the end that the small business interests as well as the great business interests of the country be conducted open and above board. If something of this character is accomplished at this session of Congress, then indeed may your own hope find realization as you express it in the "New Freedom." I refer to that paragraph wherein you say:

"In all that I may have to do in public affairs in the United States, I am going to think of towns such as I have seen in Indiana, towns of the old American pattern, that own and operate their own industries, hopefully and happily. My thought is going to be bent upon the multiplication of towns of that kind and the prevention of the concentration of industry."

Mr. President, your vision will not find fulfillment unless unrestricted publicity as to practices and policies be given to all branches of industrial activity. In closing, permit me to state that this is the first time in the history of the country when the small merchant class has come directly to the President and discussed its needs. On behalf of this class, and indeed the rural life that the country merchant typifies, I thank you for this privilege and this opportunity.

Mr. MOOREHEAD. President Wilson, in his book on the New Freedom—I presume you have read that——

The CHAIRMAN. I have.

Mr. MOOREHEAD. He sets forth our case much more fully than I could hope to, and he speaks of the strength and the power and the wealth of this Nation being in the country rather than in the cities.

The CHAIRMAN. Mr. Moorehead, this is what the committee desires: We are attempting to frame legislation——

Mr. MOOREHEAD (interposing). Yes, sir.

The CHAIRMAN. We would like to know what is wrong about the present antitrust law of which you complain, and we would like to know what you suggest as a remedy.

Mr. MOOREHEAD. The present antitrust law can not be violated, as we look at it, by a great aggregation of capital; for instance, a great mail-order house or a great manufacturing institution acting alone. But they can, by their methods, absolutely destroy their small competitors, and the small competitors have no remedy.

The CHAIRMAN. What are the methods of which you complain?

Mr. MOOREHEAD. One of the principal methods is the publication of misleading and untruthful advertising.

Another is a discrimination in price, to an extent that the little man could not hope to meet the price of the large buyer.

Now, we understand very well that there should be a discrimination in price between the man who can buy large amounts of any item and the men who can not buy such large amounts, but that dif-

ference should not be so great as to amount to a profit or a total of the gross profit of the little man.

The CHAIRMAN. Then you would think this committee ought to favor an amendment fixing the prices—the retail prices of commodities?

Mr. MOOREHEAD. No, sir; when I, for instance, with my competitors undertake to get together in an organization or an association to combat the methods of the mail-order houses, we can get into a conspiracy; but we may be fighting one man, for instance, and he can not get into a conspiracy; he can not violate the law, but he can say to us, "If you interfere with my business and my methods of business I will hold you responsible under the Sherman antitrust law"; and our hands are tied. We can not even tell the truth.

The CHAIRMAN. Then, what legislation do you desire?

Mr. MOOREHEAD. We would like to see honesty in advertising. We would like to see—I understand from the public prints that it has been proposed in your committee that it be made a specific violation of the Sherman law to give any information, however truthful it may be, about anybody else's business, to make that unlawful. We believe that publicity would cure more ills and do more to help the little man fight his battles than any other one thing that could happen. We believe that secrecy is what big business wants to have.

I have no doubt that you will be asked not to make any reference or recommend action looking to the exposure or making public of the business acts of a larger competitor by the small competitor, but you will be asked to make such a thing illegal.

Gentlemen, I trust that you will not finally permit such a thing to be put over on the little business man of this country. I have tried to set forth in this argument which I presented to President Wilson and which has been incorporated in the record of this hearing just what the little man means to the country and just what the small towns of this country mean to it—most of you gentlemen live in small communities—and just what economic, social, and political problems we are finding in this concentration of business and population in the great cities.

Mr. CARLIN. Have you read the bills which have been prepared and which are before this committee?

Mr. MOOREHEAD. I read them only about an hour ago.

Mr. CARLIN. Do you not think that section 10 of bill No. 1 would give you some relief?

Mr. MOOREHEAD. I am not prepared to say.

Mr. CARLIN. I will read the language of that section to you:

> That it shall be deemed an attempt to monopolize trade or commerce among the several States or with foreign nations or a part thereof for any persons in interstate or foreign commerce to make a sale of goods, wares, or merchandise, or fix a price charged therefor or discount from or rebate upon such price, on the condition or understanding that the purchaser thereof shall not deal in goods, wares, or merchandise of a competitor or competitors of the seller.

Mr. MOOREHEAD. I am not up on forms of law. I do not know whether that would cover the case or not.

Mr. CARLIN. The intention is to liberate the retailer and give him a right to sell anybody's goods he wants to sell and to prevent a contract which would require him to sell exclusively a particular line of goods.

Mr. MOOREHEAD. That may be the difficulty of some lines of retailing, but that is only incidental to the great problem.

The business that is big enough, the aggregation of capital that is big enough to say to the manufacturer: "You sell us your product at such a price. If you do not do it, we will manufacture that product ourselves." That is the main thing. And what is the result?

Mr. CARLIN. You do not catch the idea of this section. The idea is that the manufacturer shall not say to any one man that he shall sell the particular line of goods of that particular manufacturer exclusively. It liberates the retailer. It liberates the retailer from that situation and allows him to buy goods of anybody he wants to and sell them in his store.

Mr. MOOREHEAD. I think that may be all right, but where that might be relevant to one case, there would be hundreds of cases that would not be on that line.

Mr. CARLIN. I am calling your attention to that one thing now, and ask you whether you do not think that would be helpful?

Mr. MOOREHEAD. I see no objection to it now.

That is not to be compared to the big question. Here is the proposition: As I started to say, the manufacturer may be intimidated to sell his goods to a large distributor by having it said to him, "You must sell us these goods at such a price, or we will make them ourselves." What is the result? The big buyer gets the goods at cost, and that gives him a tremendous advantage over the little fellow.

Mr. CARLIN. We have attempted to reach that condition in a different section.

Mr. MOOREHEAD. I hope you will.

Mr. CARLIN. I will read you that section:

That it shall be deemed an attempt to monopolize trade or commerce among the several States or with foreign nations or a part thereof for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities with the purpose or intent to thereby injure or destroy a competitor either of such purchasers or of the seller.

Mr. MOOREHEAD. You would have to prove he was attempting to destroy the competitor.

Mr. CARLIN. Or to injure him.

Mr. MOOREHEAD. Or to injure him. It would be a very difficult matter for me, as a little retailer, to do that.

In the first place, I would not have the money or possibly be in a position to gather the evidence to prove that the man had actually done that intentionally. The fact that I would have the right to say to a hundred or a thousand men dealers in my line of business that such and such a manufacturer or mail-order house has done this thing, knowing it to be the truth, would help to correct a condition of that kind a great deal easier than a lawsuit.

Mr. NELSON. You desire permission to organize rather than to bring about the dissolution of the other fellow?

Mr. MOOREHEAD. We do not want to dissolve anybody. We understand fully that everybody has a right to sell goods. We have never denied, and do not deny, the right of the manufacturer to sell to the consumer, if he wants to, or to sell to a mail-order house at a price less than he sells to me, if he wants to, but when I have certain

information, and know that it is true, and disseminate it to my fellow merchants, I am subject to the Sherman law.

Mr. NELSON. You want to be relieved from that?

Mr. MOOREHEAD. I want to be relieved from that, especially when I know I am telling the truth. If I did not tell the truth, he would have action against me for libel, but when I am telling the truth, I do not believe the Sherman law should say you are violating the law, when the big fellow can not violate it, claiming he is doing it by himself.

The CHAIRMAN. What specific right or privilege do you want conferred upon the retailer?

Mr. MOOREHEAD. The right to give publicity.

The CHAIRMAN. What do you mean by that, and how?

Mr. MOOREHEAD. Through organizations or personally; in any way, by publication or by letter.

The CHAIRMAN. Giving publicity to what?

Mr. MOOREHEAD. To any act of any competitor that tends to injure me in my business.

The CHAIRMAN. Can you not do that now?

Mr. MOOREHEAD. No, sir; that is exactly the proposition.

The CHAIRMAN. Why can you not, in your own individual capacity, put your own advertisement out, contradicting the advertisement of which you complain, if the other advertisement is not true?

Mr. MOOREHEAD. I could do that in a county paper, but I would not have money enough to spend for advertising against his millions; I could not combat that.

The CHAIRMAN. I am trying to get at what particular thing you complain of, or what you want done; what particular remedy you desire.

Mr. MOOREHEAD. Give us the right to disseminate the truth.

The CHAIRMAN. You have that right now.

Mr. MOOREHEAD. As an individual I might, but with a dozen, a hundred, or a thousand, in my line of business, I would not have that right.

The CHAIRMAN. The dissemination of the truth is in no wise a restraint of trade.

Mr. MOOREHEAD. I quite agree with you.

The CHAIRMAN. Nor a monopoly.

Mr. MOOREHEAD. I quite agree with you on that, but that is the contention of the Government in a case that is in the courts, that we are in restraint of trade, even though it may be the truth.

Mr. FLOOD. Is there a case of that kind?

Mr. MOOREHEAD. Yes, sir.

Mr. FLOOD. Against your association?

Mr. MOOREHEAD. Against an association in which I am interested.

The CHAIRMAN. What is the case?

Mr. MOOREHEAD. You gentlemen are all familiar with the fact that the Bureau of Corporations has for a long time been investigating all kinds of associations. They have been in the offices of every line of business in this country, and they have had access to all the papers of the different organizations, so far as I know. They have seen fit to bring to a head what they term a violation of the antitrust law against the retail lumber associations, which has culminated in an

indictment against the secretaries of those associations, the withdrawal of which indictment was one of the last acts of Mr. Wickersham, for the simple reason, I have no doubt and nobody who is interested in the matter has any doubt whatever but what those indictments were procured by our competitors, or largely by our competitors.

There is a civil suit instituted in place of a criminal suit now pending against one of the retail lumber associations of the country, in which every retail organization of this country of every kind is interested, in which the issue is the right of an organization to disseminate information, however true it may be, as being in restraint of trade under the Sherman law.

Mr. VOLSTEAD. Was not that information as to the fixing of prices?

Mr. MOOREHEAD. No, sir. Nowhere within the last six years, so far as I know, has any member or any agent of the Bureau of Corporations found, in any retail association of any kind, in anything that has been made public, so far as I know, any attempt to fix the price of any commodity whatever.

Mr. VOLSTEAD. Not to fix the price of lumber?

Mr. MOORHEAD. No, sir; never. I can say it never was done in that line of business or in any other line of business.

Mr. FLOYD. You say suits have been brought?

Mr. MOOREHEAD. Yes, sir.

Mr. FLOYD. And indictments were had, in one instance, which were dismissed?

Mr. MOOREHEAD. Yes, sir.

Mr. FLOYD. Have any suits been instituted, any prosecutions been had or indictments been brought, where any court has held that to disseminate truthful information at the instance of an organization is against the Sherman law? If it was false, of course, I concede that ought to have been done.

Mr. MOORHEAD. As far as I know that has not been shown.

Mr. BARRY. I think there was one case.

Mr. FLOYD. In what case?

Mr. BARRY. The case known in the trade press as the Eastern case, which was decided adversely to the lumber men by the lower courts, and which is now before the Supreme Court.

Mr. FLOYD. Where did that case originate?

Mr. BARRY. In New York City.

Mr. VOLSTEAD. What is the accusation in that case?

Mr. BARRY. The accusation was that they maintained a black list. I know nothing about the details of that case, and am not representing anybody interested in it.

Mr. VOLSTEAD. Some years ago when this case was started, I remember the lumbermen complained that the prices were being fixed, and I am very much surprised—of course, this relates only to my section of the country—that there was any dispute about that, or any denial that it was the contention of the Government that they were fixing prices and distributing through the mail regularly the various figures as agreed on.

Mr. MOOREHEAD. I have no question but that you have had that impression.

Mr. VOLSTEAD. There is no question but that the lumbermen had that impression; whether or not it was true I do not know.

Mr. MOOREHEAD. I think the Government officials when they started into the case had that impression, but they have never found anyone to indict.

Mr. VOLSTEAD (interposing). Were not the indictments brought upon that kind of charges?

Mr. MOOREHEAD. I do not so understand. I think the indictments were brought out of a mere feeling that would be brought out in such a fight; it was done, I think, to get back at their competitors; and I think when the Attorney General saw that he dismissed the matter.

Mr. VOLSTEAD. The newspapers in my part of the country must have been misinformed.

Mr. MOOREHEAD. I know the newspapers all over the country have the same impression, that I am in cahoots not only with my local competitors, but with my competitors all around me, although the fact exists that I have not been on good terms with my local competitors in seven years.

Mr. DANFORTH. Can you not give us an illustration of the kind of truthful information which you want to have the right to publish, but which you can not, as you claim, now publish? Give us a concrete illustration.

Mr. MOOREHEAD. I will be very glad to do so.

There has existed since the Civil War a large sash and door factory at Davenport, Iowa, a jobbing house known as U. N. Roberts & Co. Some 8 or 10 years ago that business passed to the younger generation of the family who own the original business.

They conceived the idea that they would operate a mail-order house, selling direct to the consumer out of the office through which they were selling to the retail merchant, and they established such an organization.

In order to get a name under which they could operate in the same office, they took the middle names of the young men who were going to operate the mail-order house and gave it the name of Gordon, Van Tyne & Co., out of the middle names of the firm that owned the Roberts Co. They were operating a business, selling to the retailers throughout the country, and the jobbers, and from the same office selling to the consumer under the name of Gordon, Van Tyne & Co., using such advertising matter as this: "We own our own timberlands; we manufacture our logs into lumber; we make the lumber into doors and windows; and we sell direct to the man who uses them"; and in the case I referred to awhile ago, in which the proprietors of this same organization gave the principal information against the lumber association, he testified:

It is true you own the largest mill in the world?—One of the largest.
Your catalogue says the largest; is that true?—One of the largest.
You say you own timberlands; is that true?—As individuals, we own some timberlands.
How much; 1 acre, 2 acres, or thousands of acres?—I do not know exactly.
As vice president of the Gordon, Van Tyne Co., you say you do not know how many acres you own? How many acres do you think?—Over 10,000, but they have never been logged.

There is an advertisement which says they own their own timberlands, they saw their own timber, but this man testifies under oath that the timberlands they own in the family have never been logged.

Mr. FLOYD. If you published that fact to the world, would it be in violation to the Sherman law?

Mr. MOOREHEAD. I have no doubt in saying to the gentleman that this firm was responsible for that indictment against the lumber secretaries, and also the civil suit which has been brought. We are up against it.

Mr. MCGILLICUDDY. What part of the Sherman law is that a violation of?

Mr. MOOREHEAD. I am not able to tell you, because the question has not been decided.

Mr. FLOYD. Is it not a fact that you are asking for legislation before the question has really been adjudicated? You say the indictments were dismissed?

Mr. MOOREHEAD. The civil suit is pending.

Mr. FLOYD. It is before the Supreme Court?

Mr. MOOREHEAD. There is one suit known as the Eastern suit, in which there are other interests involved.

Mr. FLOYD. I can conceive that if in publishing this information you could instruct the members of your organization throughout the country not to deal with these people and attempt to create a boycott you might come within the provisions of the law, but it is inconceivable to me that upon the straight proposition that you tell the truth about another man's business, you would come within the purview of the Sherman Act.

Mr. MOOREHEAD. You are right at the point for which we are contending. That is, that all we want is the right to tell the truth. We do not desire to keep a black list.

Here is the proposition. Dun or Bradstreet can report me for not paying a debt, for being slow pay, or being in trouble with my wife, and things of that kind that would absolutely ruin my credit. But when I come back and attempt to speak the truth about a matter of this kind I am confronted with the Sherman law, and I can not fight it by myself; I can not afford to.

Mr. FLOYD. I want to repeat what I have said, that you have cited no case in which the court has held that fact to be a violation of the Sherman law.

Mr. MOOREHEAD. No, sir.

Mr. FLOYD. You have stated that some of your competitors—that you believe that one of the suits which has been brought was inspired by some of your competitors who tried to bring that within the provisions of the Sherman law.

Mr. MOOREHEAD. That is the way it looks to us.

Mr. BARRY. We were distributing that information, and the Government held against us on the ground that it was conspiracy in restraint of trade. These are the words of McCutcheon, and he brought the information, and I am one of the fellows in it. We distributed that information, and the case is now pending before the Government claiming that we violated the Sharman law in so doing. We distributed the information through the association.

Mr. FLOYD. Has any court decided that case, any Federal court, or is it simply stated——

Mr. BARRY. Only in so far as the Eastern case, so called, involves the same question. That has been passed upon by the Federal court

and is now up into the Supreme Court of the United States on appeal. This other case is held up pending the rendering of a decision in the Eastern case.

Mr. FLOYD. I understand that in the Eastern case there were other questions involved.

Mr. MOOREHEAD. I presume there are; I do not think there is any question about that, but we are not representing them.

Mr. BARRY. We have spent $100,000 now.

Mr. FLOYD. I can see the necessity of a remedy if the courts should take the view of the complainants. But until the courts have taken that view and held that view of the law it would seem to me that any action on our part to remedy a condition which, to my mind, does not exist would be premature.

Mr. MOOREHEAD. Our reason for being here is that you are going to make amendments to this law, they are going to be the law of the land until the court says they are not the law, and that is the reason we are here. If it is premature, it is because we believe this is our only chance to get in.

Mr. FLOYD. We are glad to have you here and to have your views, but what I suggested was that so far as the matter of these cases is concerned they have not yet been finally decided, but that does not detract from the value of your information. We want every phase of information we can get.

Mr. MOOREHEAD. We are here because we were advised to come at this time, and we thought the amendments were going in and that they were going to be made, regardless of the decision of this or any other case.

I presume if you would make plain a new law it would even supersede a decision of the Supreme Court that might be rendered on a case begun five years ago.

Mr. BOLMAN. Until this question is brought to an issue, the committee will hardly see the necessity and wisdom of changing it until it is demonstrated that the Sherman law does actually prevent the dissemination of that information.

You can probably easily conceive of an instance where that might work a terrible hardship for a long time, through its lack of directness, even though the issue has not been brought to a conclusion.

That is illustrated in this case, this case against the lumber associations of the West.

Now, as a matter of fact, that was brought three years ago. In other words, three years ago we were brought face to face with the possibility that we were violators of the law and we were warned, and are warned by the prosecuting attorneys, that the dissemination of that information is in violation of the law, and that we are liable to prosecution, and in this instance that contention is made.

Now, being face to face with that situation, we would have no safety in going ahead and doing what we might construe was within the law, when, at the same time, we would realize that the court might take the opposite view, and, for telling the truth, we would be in the meshes of the law.

It seems to me we are entitled to the elimination of confusion, and that is one thing that I think we might properly plead for at this time, that there be a definition as to what constitues a violation of

this law. Our hands are tied, and out in Chicago now the prosecuting attorney has this very matter. We are pleading for a conclusion of that case, so that it may be determined by the courts whether we are violating the law. The officials of the Government in Chicago are sitting down and simply saying that some of the issues involved in that case are involved in the eastern case, and that they are not going any further against us until they see whether the final decision of the Supreme Court clarifies the issues on which we have made our case. If it does, and it is decided against the Government, we will drop the case against you, they say; if it is not, we will go on with the case.

On the other hand, we can never know until this certain case is concluded, and we will not then know whether we are violators; we will only know whetherthe Government elects to continue the prosecution of these cases. It is easy to conceive that the volume of business in the courts may be the reason for tying this case up for two or three years more.

Mr. NELSON. Is this the only thing they are complaining of?

Mr. BOLMAN. That is the only thing, I think.

Mr. NELSON. Not that you are getting together as an association and conferring, with respect to territory, and so forth?

Mr. BOLMAN. Absolutely not. I will tell you the origin of that case. That case was founded on the organization of the Secretaries' Bureau in the West. That was a bureau of the secretaries of the various trade associations which could disseminate among the members such information, to be specific, as, for instance, that Jones, a lumberman in the South was selling to Sears, Roebuck & Co. If that information was furnished to the various members of that organization, the dissemination of that information, according to the officials of the Government, constitutes a restraint of trade, even though it might be truthful information.

For instance, I am in the lumber business at Leavenworth, Kans. Of course, you know, if I learn that the Jones Lumber Co., for instance, are selling to Sears, Roebuck & Co., or any other factories, and they are shipping to my customers, and at the same time attempting to sell to me, in other words, being in my service and at the same time being my competitor, the minute I hand that information in to a secretary, or he hands it to me, we are forming a combination in restraint of trade, according to the construction of the Government officers.

The law permits me to act on that information, but it is impossible for me to secure it. I am a local man in a local community. The minute I employ other counsel, other associations' counsel, in the shape of a secretary to gather that information, and keep it on the association's files, so that he might hand it to me voluntarily, that association is a combination in restraint of trade, according to the construction of the Government.

Mr. VOLSTEAD. I presume this is the situation. The contention, of course, is that you are preventing, for instance, this concern in Iowa from selling to other members of your association by advertising it as unfair in competition?

Mr. BOLMAN. Yes.

Mr. VOLSTEAD. What you want, then, is practically what the labor men want. You want to be able to say that certain persons shall not sell to the consumers?

Mr. BOLMAN. No; we do not want to publish an unfair list. We want simply the ability to publish that information. So far as that contention is concerned, I have been a member of associations for seven years, and member of the Southwestern Lumber Dealers' Association. That is only one of the associations. I have been a director for several years. I have never heard during my membership or during my directorship any discussion of the question of division of territory or the setting of prices or of a boycott.

Mr. VOLSTEAD. The proposition is to boycott anyone who sells directly to the consumers?

Mr. BOLMAN. No, sir; I think the association would not object if the law specifically prevents any attempt at a boycott or combination. If I, for instance, know that the man from whom I am buying lumber is trying underhandedly to take my customers away, and at the same time he comes and on the quiet attempts to take a customer away from me when he is selling me goods, I do not need any association or boycott to keep me from buying from him.

Mr. NELSON. Would not what you want result in this—and, of course, I am looking after the interest of the consumer, too—what you wish is to have certain information and the right to disseminate information that will make it impossible for a jobber or wholesaler to sell the consumer, and the consumer would have to buy from the retailer, or else the wholesaler would be punished by your withdrawal of patronage.

Mr. BOLMAN. By my individually withdrawing it?

Mr. NELSON. Individually.

Mr. BOLMAN. Certainly.

Mr. NELSON. That would result in every retailer knowing what is being done so that he can withdraw his patronage from the wholesaler who is selling direct to the consumers?

Mr. BOLMAN. That would be within the choice of the retailer.

Mr. MOOREHEAD. Every item of consumption in the country is in competition. We are in competition in every way every day. There is practically not a single thing that is not in competition.

Mr. NELSON. With the present status of combinations in the country, unless you are permitted, as retail merchants, to combine to meet the larger units of capital you must quit your business?

Mr. MOOREHEAD. I think we are quitting very rapidly. Several thousand towns in nine States have lost population, and the merchants are a discouraged set of men.

President Wilson has seen that proposition, and has seen that the towns are going down hill, and that the little men are discouraged. We are not asking anything in order to put the other fellow out of business. We just want a chance to fight for our life. That is all we want. We can not fight with our hands tied, because the other fellow can not violate the law, and we do violate it, according to the construction of the Government, whenever we get together to fight our own battle.

Mr. NELSON. I have always believed that you gentlemen in local places, in cities, got together and agreed on prices of various articles, or that there was a sort of gentlemen's agreement of some kind.

Mr. MOOREHEAD. Perhaps so.

Mr. NELSON. You deny that there is anything like that in any part of this country.

Mr. MOOREHEAD. I deny that any association undertakes to do anything of that type. It may be done by an individual in a community, but the association has no knowledge of it, and does not encourage it in any way. I do say that, absolutely.

Mr. NELSON. In the lumber business, in the Northwest?

Mr. MOOREHEAD. I do say the association has never had anything to do with the fixing of prices or the controlling of territory.

Mr. NELSON. But you do not deny that you will divert your patronage from the wholesaler who sells to a consumer?

Mr. MOOREHEAD. If I knew it.

Mr. VOLSTEAD. Of course, we had the tariff fight in 1909, and we had a lot of those cards of the lumber associations sent to various sections, all over the Northwest, with the same identical prices on all the cards, and those cards were scattered all over the western country.

Mr. MOOREHEAD. Those things did not originate in any retail association.

Mr. VOLSTEAD. They originated, I think, in St. Paul and Chicago. I think those were the places. I remember comparing two coming from different places. They were identical and they were sent all over the western country.

Mr. MOOREHEAD. Perhaps so, but that was not done by any association or organization.

Mr. VOLSTEAD. It was done by some lumber association; I can not give you the name of it at the present moment. The cards purported to have come from the secretary of two different lumber associations with two different headquarters.

Mr. MOOREHEAD. I can say that is not the case in the suit now pending, which is against the secretary of an association in that country, and that has never been the contention by the Government. They did not find that. They have never found anywhere anyone in the lumber associations; they have not found anyone in the hardware associations, or in any of the other associations; they have never found in those associations anywhere that at any time, anywhere, any association has attempted to control the price of anything. Our whole method is to protect ourselves against the big fellow.

Mr. NELSON. Let me ask you this question in regard to the matter of the technical operation of the business. How do you agree upon prices in a retail business? Is it by suggestion from the wholesaler that such and such an article ought to bring such a price?

Mr. MOOREHEAD. No, sir; never.

Mr. NELSON. How do you fix your prices so that they are uniform in a city?

Mr. MOOREHEAD. I could not tell you how it is done. It is probably done by the local people in a particular city; it is not done outside.

Mr. BARRY. I would like to ask if you know of any place where that is true?

Mr. VOLSTEAD. You can find plenty of that out in my country during the last year or two.

Mr. MOOREHEAD. I know it is generally true that in any line of business the retail merchants in any community are usually fighting like cats and dogs for all the business there is in a community—fighting among themselves. There may be cases where they may attempt to fix a price. That is one of the unfortunate things about a law of this kind, if they fix a price, and get only the cost, they are just as guilty as otherwise.

Mr. VOLSTEAD. We have had large concerns that control the lumber yards from one end of the State to another. Take, for instance, in the State of North Dakota—I do not come from that State—but there are lumber yards there, running from one end to State to another, controlled by such concerns—not as warehouses—but there are others who control yards in that fashion.

Now, of course, we have the warehouses. We have C. B. Walker, and we have Shevlin & Co., and, of course, they practically control the lumber interests, and the question of competition is absolutely outside of any consideration at all.

Mr. MOOREHEAD. I do not know anything about that situation; but I am positive about this: That the retail association in that country, which covers that territory, has nothing to do with the conditions, and in many cases the public has exaggerated ideas of the value of a retail association of any kind. If it were not for the insurance feature of the Northwestern Lumbermen's Association, those very men would question whether they would pay $5 a year to stay in it.

Mr. VOLSTEAD. Those same men run the retail yards?

Mr. MOOREHEAD. They are saving hundreds of dollars by a mutual insurance proposition which is holding them together. That is the only thing that is holding the retail yards in that association, is the insurance feature. It saves us a great many thousands of dollars, and I know those men would not hang together if it were not for that.

Only 60 per cent of the lumbermen in my State belong to that association. If the associations were worth only one-tenth of what the public believes they are, they could not afford to stay out for $500 a year.

Mr. VOLSTEAD. What State do you come from?

Mr. MOOREHEAD. I come from Missouri. It is true everywhere, however.

Mr. VOLSTEAD. I am talking about the situation in Minnesota.

Mr. MOOREHEAD. If it were not for the insurance feature, I believe there would not be any association.

Mr. BARRY. It seems to me that there is just a little wrong impression being left here.

I do not think this Judiciary Committee would be warranted in considering retailers, except as what affects us would affect the community. That is the only reason for it. That proposition ought to be left clear in your mind. If the retailer can not have the trade of the consumer, he can not stay there. He will have to quit. If he quits, what is the effect on the community? He is quitting by the score.

You centralize the distribution. You say the largest aggregation of capital in this country is devoted to the distribution of goods. You centralize it through the fellow you say we boycott. If a man slaps me in the face, I do not need an association to tell me to slap back.

Mr. NELSON. There is a very interesting condition of things going on in the country. I would like to inquire, inasmuch as you are one of the retailers of the country, where the excessive cost to the consumer comes in. For instance, in Minnesota, a Member of Congress from that State told me that some farmers sold their potatoes up there and sewed up the bags and inside the bags they said, "I get 27 cents for a bushel of my potatoes. When you buy them, Mr. Consumer, please let me know what you pay," and they received letters back from Kansas and from other States, saying, "We paid $1.30," or something of that kind. Who makes the large part of the increased cost to the consumer, the retailer or the wholesaler or the transportation company?

Mr. MOOREHEAD. I do not think the transportation companies get a very great amount of it, and I do not think the retailer does. You can not put your finger on a retail merchant who has gotten rich, you can not find more than one in a thousand. If he gets an exorbitant price he is not helping his community.

I know last year that some potatoes came to Kansas City, 40 car loads, and stood on the railroad tracks, and could not be sold at any price. I know a retail grocer in Kansas City said to his customers, "I would be glad to present you with a bushel of these potatoes," and he had bought them for 15 cents. But the papers in Kansas City did not give that merchant credit for helping out the consumer, and those potatoes rotted because there was no sale for them. I do not know who they belonged to; if they belonged to the commission man he lost it.

Mr. PETERSON. Is it not a fact that your association, or some other association, issues a catalogue which simply states the price of all kinds and qualities of lumber, and that there is a discount and that the retailer understands that that is allowed on different kinds of lumber which are catalogued, and in that way the price is fixed, and the price is fixed to the consumer or the retailer?

Mr. MOOREHEAD. Absolutely, a retailers' association has never done anything of that kind.

Mr. PETERSON. That is done, is it not? There is a catalogue of that kind?

Mr. MOOREHEAD. No, sir. The various manufacturers of lumber issue price lists. You probably would not understand why there would be a discount. Here might be a few items on the list, and that printed list might be printed for a month. If the price changed to-day, for instance, instead of getting out a new list, they will say it will be a dollar higher or lower, and it has nothing to do with the retailer's price to the consumer. It would be only the manufacturer quoting his cost price, whether he is a member of an organization or not. I want to disabuse your mind of that idea.

Mr. PETERSON. Your idea that the list is issued by the wholesaler and that the retailers' association has nothing to do with it?

Mr. MOOREHEAD. I say, absolutely nothing.

Mr. PETERSON. I wondered where that came from.

Mr. NELSON. Do not those figures tend to fix a suggestive price, and the consumer naturally pays that price, but the retailer would get it at a lower price?

Mr. MOOREHEAD. That is what a retailer would have to pay for it. He would have to add his profit. It only indicates what the stuff is worth to the retailer.

Mr. PETERSON. Does not the retailer take that list, which does not show any discounts, and show it to his customer, and say, "That is what I have to pay," when it is not, and he is deceived in that way by the circulars?

Mr. MOOREHEAD. There might be a discount from the price list and the retailer might tell an untruth about it. He could do that anyway, but it would be absolutely fatal in the lumber business. If I should write to a manufacturer for prices, it would take him half a day to quote me prices given on a price list. He would simply say, here is a price list, you may get the prices from that. But it would take him half a day to quote all the prices, if he did not have a price list. Every business is done in that way. They have price lists that they send out. It has absolutely nothing to do with the prices that the retailer makes to the consumer, or what the consumer has to pay; absolutely nothing.

I know you gentlemen down here in Congress have been possessed with these ideas about the lumber business and other lines of business. I know we are in the limelight, and I know why the Government brought the suit against the lumber people rather than against somebody else. It was because public opinion had been directed that way by this firm and others. We are trying to straighten ourselves out.

Mr. PETERSON. I would like some one to give me the information as to how the prices are fixed.

Mr. MOOREHEAD. They are absolutely not fixed by the retailers to the consumer, except possibly where two or three retailers in a community might fix the price, as far as this association is concerned. I want to bring home to you a personal case in which a campaign of this kind has crippled me in my town and in my county. A banker in my town walked into my office a few weeks ago. He said, "I have just written the largest draft I have ever written to be sent to a mail-order house." I said, "What did you write it for?" He said, "For $1,140." I said, "Whom did you send it to?" He said, "Sears, Roebuck & Co." I said, "For whom did you send it?" He said, "That is none of your business." I said, "What did he buy it for?"

But he would not give me any satisfaction. I do not think there is any farmer in that town or in that community who can build a house without my finding it out some day. That man had read the catalogues and had read about the propositions, and had probably heard some public man talking against the lumber business, and he had probably said to himself, "I am not going to give Moorehead a chance. I am going to send my order away," and he did. I would have been glad to have furnished him his lumber for $1,140, and I would have made more money out of it than the other fellow made out of it.

That just shows how I have been injured in this way within the last 30 days. And that is going on with every retail man, every retail merchant in the country. That man will not buy a dollar's worth at home because he has been educated to believe that the home man is a greater thief than the man away from home——

Mr. NELSON (interposing). Let me give you a concrete illustration: In my home city of Madison, Wis., could I, as a consumer, buy of a wholesaler there?

Mr. MOOREHEAD. I doubt if a wholesaler would sell to you.

Mr. NELSON. Why not?

Mr. MOOREHEAD. I might say a wholesaler in any line.

Mr. NELSON. Why should he not, if I want to buy a large bill of goods?

Mr. MOOREHEAD. Because he thinks there is some justice and there ought to be some ethics in business. If you wanted to buy bricks——

Mr. NELSON (interposing). You mean to say he would not want to offend the retailer?

Mr. MOOREHEAD. He has sold them to the retailer, and if he sells them to you, the retailer will lose out. It is his policy——

Mr. NELSON (interposing). Do you believe that the consumer should necessarily pay the money to the middleman?

Mr. MOOREHEAD. He does not have to.

Mr. NELSON. This compels him to, in the case which I have cited, if he can not get it from the wholesaler.

Mr. MOOREHEAD. He can get any item you might mention from a mail-order house, from any mail-order house in the country anywhere.

Mr. NELSON. I know it is oppressive on the retailer, but we have got to look to the greatest good of the greatest number.

Mr. MOOREHEAD. Yes, in that way; you want to look, it seems to me, to the community, necessarily, as the important thing.

Mr. NELSON. The gist of your complaint is that you have not the right now to publish the fact that a person has sold to a consumer in your neighborhood?

Mr. MOOREHEAD. Yes, sir. I do not think we have it. That is the contention of the Government. We are not going to violate the law.

Mr. PETERSON. The Government contends that by doing that you restrain trade; that is the contention?

Mr. MOOREHEAD. Yes, sir.

Mr. PETERSON. In the way of a boycott upon the wholesaler; that is the contention of the Government? It is the contention, is it not, that your association can combine for the purpose of restraining trade by advertising those that sell at retail, the mail-order houses; that is the Government's argument, is it not?

Mr. VOLSTEAD. Of course, your objection is not to the sale by the mail-order houses. Your objection, I presume, is that the wholesale dealers selling lumber occasionally sell to the consumer instead of to the retailer, and it is that fact which you desire to publish to the other members of the association?

Mr. MOOREHEAD. There are plenty of people engaged in that business, altogether.

Mr. VOLSTEAD. It would not be of any value whatever to publish the fact that Sears, Roebuck & Co. were selling lumber?

Mr. BARRY. Would it not be of value to us to know what our competition is?

Mr. MOOREHEAD. We are forced to do business without knowing what our competitors' methods are. We want to know.

We do not want anything else. Have we any right to get that information? We are asking you to give us that right.

Mr. BARRY. I took this matter from a paper at the hotel. Here is a man who says that we want $3.50 for a sash. Our advertisement is running in a local paper, and we say we sell that for $1.75, and we pay the freight. That is a case in point. This man says we want $3.50 for the sash. That is the kind of advertising there is all over the country. People do not come to us.

Mr. MOOREHEAD. That advertisement will show that they will sell storm sash at that price, and people will not go to the local dealer.

There were $276,000,000 worth of goods shipped from Chicago in the year 1912.

The CHAIRMAN. How are you going to compel a man to patronize you rather than somebody else?

Mr. MOOREHEAD. We do not ask that.

The CHAIRMAN. That seems to be your complaint.

Mr. MOOREHEAD. We do ask that this man be not permitted to put forth untruthful matter.

The CHAIRMAN. Do you want to stop a man advertising his goods and wares for sale?

Mr. MOOREHEAD. No, sir; not that; but compel him to tell the truth about it.

The CHAIRMAN. Then you want to censor that part of the press that relates to advertising?

Mr. MOOREHEAD. No, sir. There are a great many papers which are standing for just what we are asking for—honesty in advertising.

The CHAIRMAN. Everybody stands for that, I presume, and it is well enough to make a declaration, but to formulate some legislative proposition to meet the evil of which you complain, that is the difficulty.

Mr. MOOREHEAD. I understand the difficulty thoroughly under which you labor.

The CHAIRMAN. A magazine article, an essay, or a stump speech is one thing, but to write a legislative proposition to meet the conditions complained of is quite a different thing.

Mr. NELSON. The difficulty arises in this, that you have to compete with a tremendous business which has great resources of capital, which is concentrated and which can buy very cheap, because it buys in large quantities and can sell cheap because it buys so much at one time.

Mr. MOOREHEAD. They could sell cheap.

Mr. NELSON. They do sell as cheap?

Mr. MOOREHEAD. Some things, perhaps.

Mr. NELSON. You are disorganized, and one by one you can not compete with that competition?

Mr. MOOREHEAD. That is it exactly.

Mr. NELSON. So that you have got to be either permitted to organize to meet this power or we have got to dissolve that power?

Mr. MOOREHEAD. You could not dissolve that power. We would not ask that. We understand the mail-order house is here to stay forever. We understand the parcel post has facilitated the business of the mail-order house. We have got to fight. We are up against severe competition. They do not have to combine in order to put us out of business. Not only that, it would not only be the matter of putting us out of business, but what about the communities where we are located?

The CHAIRMAN. I sympathize with your efforts to have the people in the various communities patronize the dealers in those communities. That is right and proper. The merchants there are their fellow citizens, and they are the taxpayers and contribute everything that comes to good citizenship, to the benefit and upkeep of the community. I quite sympathize with that. But how to keep the mail-order houses from competing with the local merchants—I do not think you can do that.

Mr. MOOREHEAD. You can not do that. We welcome that competition, but the thing we want is a chance to fight back, and we do not want our hands tied.

The CHAIRMAN. How can you compel local people to buy from local merchants?

Mr. MOOREHEAD. You can not do that. We do not want you to attempt to do that.

The CHAIRMAN. That is what you seem to want; you want them to buy from you.

Mr. MOOREHEAD. We would like to be able to tell the truth about the methods of our competitors. That is all we want.

Mr. DANFORTH. Have you any suggestions to make in the way of legislation?

Mr. MOOREHEAD. We would like to have a law permitting us to do that.

Mr. DANFORTH. Have you prepared a draft of a bill or a law which you think would fill the bill in your case?

Mr. MOOREHEAD. I have not prepared that. I am a retail merchant and not a lawyer, and would not know how to prepare that.

Mr. DANFORTH. I am asking you whether you have anything to suggest.

Mr. MOOREHEAD. Yes; we have.

Mr. BOLMAN. The law we have to suggest to you is the law that has been in operation in Canada for three years. Up there they adopted our Sherman law, thinking that we were all wise and had the right law. They found it did not suit their needs, and they adopted a law up there which is known as the trades combine act.

The gist of that law is this: It provides that if any six people in any community are of the opinion that a combine exists in any trade, they may make application to the judge, stating these facts over their signatures. It is then the duty of the judge to have a temporary hearing, and if, in his judgment, sufficient evidence has been adduced to warrant the hearing, the matter is referred to three men appointed by the minister of labor, and they constitute a board to hold that hearing. The facts are submitted. If those complained against are found to be doing what they should not do, the sentence is that they shall desist. If they repeat the acts, they are then punished.

That is a law that we ought to have in this country. Of course you know we could not operate the railroads in this country under the Sherman law. You know they had to be turned over to the Interstate Commerce Commission. You know also that you pay exactly the same rate to go from Washington to any other point by whatever route you may go. If you want to go to San Francisco from Washington, you pay the same rate, no matter what road you travel on. Why? They had to confer to make these rates; every one of them

had to be arranged in a conference. These rates are made by agreement specifically contrary to the Sherman law.

What we have to suggest, prefacing my statement first with these remarks, that we hope to get through the proposed Interstate Trade Commission, which, I understand, is proposed to be organized along the lines of the Interstate Commerce Commission which has control of the railroads, a law somewhat similar, only adapted to our institutions, a law somewhat similar to the Canadian law. We hope that will come about. We hope that the Congress of the United States will never take the position that it is a crime to make a profit, or that it is a crime to agree on a price if the price is reasonable, because prices for railroad fares are agreed upon absolutely, publicly and openly. Why should not a charge by a merchant be fixed in the same way?

Mr. VOLSTEAD. Would you have that commission fix the price of your goods?

Mr. BARRY. Absolutely, no. No commission can fix that.

Mr. VOLSTEAD. The Interstate Commerce Commission does that now as to railroad rates.

Mr. BARRY. They permit the railroad to charge a certain price, if that, in their judgment, is a reasonable price for the railroad to charge. If it is a reasonable price, they permit it.

The CHAIRMAN. You would not have this trade commission fix a maximum price?

Mr. BARRY. No.

Mr. NELSON. The Interstate Commerce Commission says whether the rate proposed to be charged by the railroad is reasonable.

Mr. BARRY. That is what we want this commission to do.

Mr. NELSON. Is that not determining the price?

Mr. BARRY. Yes; but after a hearing.

The CHAIRMAN. I have asked for a tentative proposition.

Mr. BARRY. This is what we propose as a tentative proposition:

That nothing in the foregoing shall be held to interfere with such cooperation by and among corporations, firms, or individuals as may be sanctioned by the Interstate Commerce Commission.

The CHAIRMAN. What is the number of the bill to which you propose that amendment?

Mr. BARRY. It is No. 2; I believe it has not been introduced.

Mr. FLOYD. You are reading something not in the bill, but something which you propose.

Mr. BARRY. This is a definite proposition. I am offering you as a definite proposition that anything in this bill, or in any amendment, shall not apply to such cooperation by corporations, individuals, or firms, as may be sanctioned by the Interstate Commerce Commission, or by the Interstate Trades Commission—that is the commission which will have to do with us.

Mr. CARLIN. In other words, you want to give them the discretion.

Mr. BARRY. Just as the Interstate Commerce Commission has the discretion. It can not be done otherwise. If we think that an article is worth $1.25, and the Interstate Trade Commission finds that is a reasonable price and sanctions it, we will have their sanction to that amount. That is one definite thing we would like to have from the hands of this committee.

The CHAIRMAN. That leaves in the hands of the commission the power to fix the price.

Mr. BARRY. In just so far as the Interstate Commerce Commission fixes the price, and no further. A price ought not to be regarded as a crime, a fair price. A fair rate on lumber from Kansas City to Chicago is not regarded as a crime.

The CHAIRMAN. I am just saying that the power you propose to give this commission is the power to fix the price. We are not talking about what is a crime, but we are talking about the power of that body.

Mr. BARRY. I am asking that the trade commission shall have the same power as that which is now enjoyed by the Interstate Commerce Commission.

Mr. PETERSON. That would be a maximum price.

Mr. BARRY. They can fix any price.

Mr. VOLSTEAD. How do you imagine they are going to do that?

Mr. BARRY. They are not going to do that.

Mr. VOLSTEAD. If they did not, why would not such an arrangement as that practically legalize all the monopolies you can imagine, because the commission would be absolutely helpless so far as the general bulk of articles are concerned throughout the country. It seems to me it would wipe out the Sherman Act completely.

Mr. BARRY. It applies to all the abuses. You look in the Congressional Record on page 2598 in the sessions of 1888, and then go on for the next two years, and you will find all kinds of discussion in regard to that matter, and I defy you to find a place where it says it is a crime for a man to get a profit. The small man seems to be the octupus. It does not give us an equal opportunity. We are standing for equal opportunity; that is all.

Mr. FLOYD. If I understand Mr. Morehead, his complaint is that the mail-order house puts out false advertisements, exaggerating the value of their goods, and if the retail dealers' association even publishes the truth about these houses they are now liable to be held under the terms of the Sherman Act.

Mr. MOOREHEAD. That is it, sir.

Mr. FLOYD. Now, I want to ask you this question. What remedy would the proposed legislation you suggest afford you over the mail-order houses? What would prevent the mail-order houses, after your local merchants had entered into an agreement as to price, from underselling in those communities and destroying your business, as you say they do now?

Mr. MOOREHEAD. They do not undersell us except on some leader; but not on any item that the retail merchant has had equal opportunity to figure on. We are complaining that we do not have an equal opportunity to figure on those. The merchant in your town, for instance, does not have an opportunity.

Mr. FLOYD. What is there in the existing law, the present Sherman Act, to prevent you from fixing any kind of price you agree upon on any commodity you sell?

Mr. MOOREHEAD. None whatever.

Mr. FLOYD. Have you not absolute freedom in the fixing of the price of your commodities, according to that law?

Mr. MOOREHEAD. With myself, but not with another man.

Mr. FLOYD. When you go into a domain of entering into an agreement with the other man, have you not come within the purview of the Sherman Act?

Mr. MOOREHEAD. Yes, sir.

Mr. CARLIN. Providing it is interstate trade.

Mr. FLOYD. Yes; providing it is interstate trade.

Mr. BARRY. Yes, sir; we do.

Mr. FLOYD. Do you object to the present Sherman law which prohibits monopoly?

Mr. BARRY. The issue is not there. The trouble is with the people who are selling goods by mail at high prices which they are advertising at low prices, and if we attempted to get that information before the people we are held to be in violation of the Sherman law.

Mr. FLOYD. You are on another proposition. I am talking about your proposition to create a commission similar in functions to the Interstate Commerce Commission, which will declare what will be a reasonable price on industrial commodities just as the Interstate Commerce Commission declares what will be a reasonable rate to be charged by the railroads. How does that relieve in any way the difficulty and embarrassment arising out of the conditions described by Mr. Moorehead? That does not seem to me to touch the proposition. After you had entered into your agreement, by permission of this commission, to fix a certain price on commodities, what would prevent the mail-order houses anywhere in the country from underselling you with a different price right in your own community?

Mr. BARRY. Nothing whatever, if that is the disposition about it. We want the opportunity to send out the information which we have in regard to that, and which we are prevented from sending out now.

Mr. FLOYD. That is a different proposition. If you amend the law so as to enable you to get the information without coming under the ban of the Sherman Act so that your association can go out over the country and get information—I mean true information—as to this man's commodities, the character of his goods, their real value, and any other truthful information, of course you do not insist upon the right to give out this information?

Mr. BARRY. Not at all.

Mr. FLOYD. And you would circulate that information among the members of your association, and if you are given that permission expressly by law, and you have the trade commission also created, which can say what will be a reasonable price and what shall be an unreasonable price, the commission you propose would not undertake to prevent a man from selling his goods at the lower price?

Mr. BARRY. Certainly not.

Mr. FLOYD. Then, after you obtained this information, and after you had gone to this commission and gotten it to say a certain price which you had agreed upon among yourselves was reasonable, and to sanction it, what method would you resort to to avoid the competition of the mail-order houses?

Mr. BARRY. We do not care to prevent that at all.

Mr. FLOYD. Unless you have some means of averting that competition—the destroying competition—after you have the competition, what better attitude or condition would you be in than you are now?

Mr. BARRY. We would have the right to confer under the law.

Mr. FLOYD. The law gives you that. You can circulate the information.

Mr. BARRY. Not now.

Mr. FLOYD. I am assuming you have the law. How could you checkmate that competition? If you had the information, how do you propose to checkmate it by merely having a commission to sanction certain prices among yourselves?

Mr. BARRY. Corporation does wonders, Judge. It passes laws in Congress. To cooperate is all we are asking for. Without cooperation we, as individuals, are simply chewed up by these large aggregations of capital. We may never sell at the price the commission says we may. We will always beat the price the mail-order house puts down. We simply want the chance to get the information; that is all.

Mr. CARLIN. To boil this matter down, as I understand your proposition, you think it ought to be unlawful for big business to combine, but you think it ought to be made expressly lawful for little business to combine.

Mr. BARRY. We do not want to combine.

Mr. CARLIN. You do not want to combine?

Mr. BARRY. No, sir.

Mr. CARLIN. Is not the cooperation you speak of a combination?

Mr. BARRY. No, sir.

Mr. CARLIN. What is it, then?

Mr. BARRY. It is an exchange of information; it is the dissemination of information. Now, we are forced to act in the dark.

Mr. CARLIN. But you want to act in combination?

Mr. BARRY. No; we do not. The conditions—for instance, in Mr. Moorehead's territory, may be radically different from the conditions in my Territory. We want to be able to know who our competitors are, what they are doing, and how they are doing it. It is now in the compilation which the committee has made, and which is now in the hands of the members of the committee.

Mr. VOLSTEAD. I do not see anything in it that would justify any such claim for it which was made. There is nothing in here that would authorize such commission to in any way absolve anybody from any violation of the general principles of the Canadian law, which is the same practically as the Sherman antitrust law. It is simply a method of investigating the facts and certifying them to the court, so that the court may pass judgment upon them.

Mr. BARRY. It really puts that in each individual district of the country. A man who talks about your being a trust and having your prices all fixed in combination is given an opportunity to put his name to that piece of paper and have it determined in the local community.

Mr. VOLSTEAD. It is determined by a court.

Mr. BARRY. No; first by a commission of six.

Mr. VOLSTEAD. They find the facts and they submit them to the court. But that is not material.

Mr. BARRY. That is the law we would be glad to have. It does not authorize the fixing of prices, but it sanctions the cooperation that may be undertaken by the people in the local town, if the commission finds they are reasonable. Suppose there are 20 men——

Mr. VOLSTEAD (interposing). They use the word "undue" and our Supreme Court has now used the word "reasonable," which would, no doubt, mean the same thing.

Mr. BARRY. If they find that they have not been doing anything wrong, that is the end of the case. We are ready to go before any commission at any time and establish a right to do that.

Mr. VOLSTEAD. That is the way our courts do.

Mr. BARRY. If that is the case, gentlemen, why not give us that? If that is simply a repetition of the Sherman law, why not, as an entity of our citizenship doing much for the building up of this country, if that is the case, why not give it to us?

The CHAIRMAN. Under the order of the House, bills relating to the trades commission have been referred to the Committee on Interstate and Foreign Commerce, and doubtless you can bring this matter up before them when you appear before that committee to-morrow.

Mr. BARRY. Would you suggest that?

The CHAIRMAN. I do not suggest that. I just say perhaps you can do that. We would be very glad to draw any legislation here that would help the small merchant.

Mr. BARRY. Not so much the small merchant as the communities.

The CHAIRMAN. I may not make myself wholly intelligible, but if you will give me a little time I will undertake to tell you what is in my mind.

We sympathize with your efforts, and I was referring more to Mr. Moorehead's line of discussion than to this. He wants the small man to have a fair showing. How are you going to do that? How are you going to make the local people buy from the local merchant, rather than send their money to a mail-order house? How can you do that by legislation?

Mr. BARRY. You can not. All you can do is to prevent false statements being made.

Mr. CARLIN. There is a statute against that now.

Mr. BARRY. Gentlemen, if you pick up any magazine you will see that advertising where they say "We will save you 50 per cent over your local dealer's price." You can read that in almost any magazine. Take the case of the company which manufactures a house called the Aladdin House, made by the Northwestern Construction Co. In all their advertisements they say they save so much over the local dealer, and they say they have mills in Oregon, and States like that. I got a report from Dun's on that company. It showed that $40,000 of the assets of that company were in patents and the remaining $15,000 were in various odds and ends, anything but liquid assets. And yet they are selling Aladdin houses and they say they will save you so much and ship them direct from their own mills.

The CHAIRMAN. How would you prevent those people from thus offering their goods and wares?

Mr. BARRY. That is what we are asking for; how it might be framed up, how it might correspond with the other statutes I do not know.

The CHAIRMAN. You would have to have some bureau to which the advertisement would have to be submitted and have it censored that way.

Mr. BARRY. There would certainly have to be some tribunal to pass on that.

The CHAIRMAN. How can you make such a thing practical?

Mr. BARRY. I should think a United States court should get at all the facts through a grand jury just as they could do in the case of a crime.

The CHAIRMAN. Are you going to make it a crime for a man to advertise his goods decently, to say he is selling his goods lower than the local merchants, is that what you want?

Mr. MOOREHEAD. If he misleads them I do not see why, just as if you were to pass a counterfeit to-morrow.

The CHAIRMAN. You want a statute saying these people must stop selling goods cheaper than a local merchant?

Mr. MOOREHEAD. Oh, no.

Mr. CARLIN. There is a criminal statute in existence that provides that where the mails are used for fraudulent purposes, that shall be a crime. The illustration you give is clearly an illustration of the use of the mails for fraudulent purposes, and an indictment can be had in any community to reach that very trouble. It seems to me that the trouble is not that we should have new laws, but invoke the laws already in existence.

Mr. MOOREHEAD. It looks that way, as being illegal, but nobody has undertaken to enforce a law of that kind.

Mr. CARLIN. You can go further and you can apply to the Postmaster General for a fraud order, and he has the power to issue such an order, excluding those dealers from the mail, and he does things of that sort now.

Mr. BOLMAN. Does that law apply to merchandise advertising? It prevents the promoter from painting his scheme in the flowery language that so many of them use, but that law, I think, does not apply to merchandise in any way. It is not applicable there. Why it is not so I have not a mind legal enough to say.

Mr. CARLIN. What business are you in?

Mr. BOLMAN. I am in the lumber business at Leavenworth, Kans. I have purely a local business and do not manufacture—I simply buy lumber by the carload and sell it at retail.

Mr. CARLIN. How many lumber dealers are there in your town?

Mr. BOLMAN. Three.

Mr. CARLIN. And you want the right to combine with the other two, as I understand it?

Mr. BOLMAN. That is Mr. Barry's proposition; yes, sir.

Mr. CARLIN. Now, then, do you mean when you combine that you want the right not only to combine but to agree with the other two as to what price the joint commodities shall be sold?

Mr. BOLMAN. Always with the remedy open to the people, provided for in the appointment of a local commission. Instead of compelling the people to come to Washington to seek that redress, or to go to the United States prosecuting attorney and get him to bring an action, they can apply to their local judge and get an investigation.

Mr. CARLIN. The people can do that now under the Sherman law. If you have a combination that is engaged either in whole or in part in the lumber business, engaged in interstate trade, anybody could complain to the Government prosecuting attorney and he has the right to invoke the aid of the grand jury to investigate those conditions right in the community where you are located.

Mr. BOLMAN. Sure. The only difference here is it does not make any difference what combination he is in, whether it is reasonable or unreasonable, it is equally a violation.

Mr. CARLIN. That is the point we are driving at. You want a tribunal somewhere that can say your combination is a combination that is a reasonable one?

Mr. BOLMAN. Yes, sir; we do.

Mr. CARLIN. Then, to boil it all down, you want some tribunal to say there is a good trust somewhere and a bad trust?

Mr. BOLMAN. If that seems the best way; yes. Now, we are small units and irrespective of what local conditions may exist in particular instances, because all lumbermen of the United States are not good lumbermen, as the lumbermen are not all good citizens, and as no other class are all good citizens, we want that in for the purpose of protecting our customers, and we believe for the purpose of preserving our communities and preserving ourselves also. It is simply that thereby we could effect a reasonable combination of sufficient strength to enable us to meet this outside competition.

Mr. CARLIN. Would it be well to go further and allow combinations among those people who cut the lumber in the forests—the real lumber owners—and have some tribunal fix the price at which you shall buy from them?

Mr. BOLMAN. Now, if you will permit me, I will say I am not prepared to argue that question, because I do not know all the conditions that surround the lumber-manufacturing industry.

Mr. CARLIN. From your information, then, would it not be as proper to allow the men from whom you had to buy to fix the price against you as it would be to allow you to fix the price against the consumer?

Mr. BOLMAN. Yes, certainly; because I am not coming here to ask for what I would want you to deny to other men.

Mr. NELSON. You would limit the questions, would you not, that the commission could go into?

Mr. BOLMAN. Certainly.

Mr. NELSON. Then, how many commissions do you think we would have to set up here?

The CHAIRMAN. Do I understand from what you said that this is your idea: You want the right to combine; your local dealers in your town want the right to combine in the trade in which you are engaged so as to shut the foreign men out of competition in your local market?

Mr. BOLMAN. Yes, sir; that is really a frank statement of the case.

Mr. CARLIN. In other words, you want to preserve the consumers in your own town for your own purposes?

Mr. BOLMAN. Yes, sir; because if we do not preserve them for the local merchant, what is going to become of the local merchant, and what is going to become of your town?

Mr. CARLIN. In other words, then, if he is to be skinned you want him skinned by the fellow in your own town instead of merchants away from you?

Mr. BOLMAN. If you think the merchant would engage in skinning him, we want to.

Mr. CARLIN. No; I do not say he would; but I say there is danger of it in your combination.

Mr. BOLMAN. Let me ask you: If that trade is not preserved in your home town, where is it going?

Mr. CARLIN. Is it not a good idea to let in competition instead of shutting out competition?

Mr. SCEARCE. Mr. Chairman, Mr. Moorehead came here with a written statement that he had prepared after a conference with all the representatives of the retail interests of the country; and I think that that statement reflects the views of the retail interests better than any of us, individually, can present them.

Mr. NELSON. That is what you stand for, and the others are individual opinions?

Mr. SCEARCE. The others are individual opinions. And at the close Mr. Moorehead has a concrete and specific recommendation here that I think he ought to present to you, so that we can get this in the proper light, and so that we will not be misunderstood by presenting these various personal views.

Mr. CARLIN. What business are you in?

Mr. SCEARCE. I am simply in the retail lumber business, but I was present at this conference.

Mr. CARLIN. What business is Mr. Moorehead in?

Mr. SCEARCE. Mr. Moorehead is in the lumber business.

Mr. CARLIN. Are these other two gentlemen in the lumber business who have spoken?

Mr. MOOREHEAD. We expected all these retail interests here to-morrow. This hearing to-day is 24 hours ahead of our understanding.

Mr. CARLIN. I know that, but I am trying to find out who we are hearing to-day?

Mr. MOOREHEAD. These gentlemen here are lumber dealers except Mr. Stebenthal, who is an implement man. We expected the grocers and others to be here to-morrow; but I would be glad for you to hear from Mr. Stebenthal, because the implement men ask you to make it specific that it would not be a violation of the antitrust law to tell the truth and disseminate truthful information through any agency, and it should not be unlawful to give the widest publicity to the business policies and purposes of firms and corporations doing an interstate business.

Mr. CARLIN. In what form would you put that as a legislative proposition?

Mr. SCEARCE. As an addition to this bill; provided, however, that it shall not be unlawful to give the widest publicity to the business policies and purposes of firms and corporations doing an interstate business. Now, the man who does not want his business made public has something about his business that is wrong.

Mr. CARLIN. That is not against the law now.

Mr. SCEARCE. The contention we are up against is this: If we disseminate information we have a lawsuit on our hands.

Mr. CARLIN. Yes; you have a lawsuit on your hands if you give out information to the public.

Mr. SCEARCE. And if you give information to the membership and not to the public.

Mr. CARLIN. They are not suing you for telling the truth.

Mr. SCEARCE. I think they are. To get right down to brass tacks, that is what it amounts to.

Mr. CARLIN. What is the style of the suit?

Mr. SCEARCE. The Government *v.* The Northwestern Lumbermen's Association.

Mr. CARLIN. The purpose of that suit is to dissolve the association?

Mr. SCEARCE. No, sir; I think not.

Mr. CARLIN. What is the purpose?

Mr. SCEARCE. The character of it, as I recall, is a prosecution of the members for furnishing information, as being against the Sherman law. Understand, I am not an officer of any association——

Mr. CARLIN. But there is not anything in the Sherman law to prevent you giving information to anybody you please. What I suspect they are really doing is filing a suit against the Northwestern Lumbermen's Association to dissolve your organization because you operate in restraint of trade—because you are a trust?

Mr. SCEARCE. Yes.

Mr. CARLIN. Now, is not the effect of your association to-day to make uniform prices for lumber?

Mr. SCEARCE. Never, sir.

Mr. CARLIN. Do you gentlemen sell at different prices?

Mr. SCEARCE. We say we do—everyone of us.

Mr. CARLIN. Do you gentlemen living in the same town sell lumber at different prices?

Mr. SCEARCE. I say we do.

Mr. BOLMAN. We have several lumbermen in our town selling at different prices.

Mr. MOOREHEAD. Now, it is possible for five or six or seven to get together and fix the price, but it would not be an interstate proposition at all; but they could not do it for any great length of time, because of the mail-order competition. As I said before, we are in competition with every dollar's worth of stuff we sell.

Mr. CARLIN. And competition is the only thing that prevents you from maintaining a high price?

Mr. MOOREHEAD. I am not asking you to shut it out. I know you can not do it, and it is getting stronger all the time.

Mr. CARLIN. You are the president of this association?

Mr. MOOREHEAD. No, sir; I am the secretary of the association that was gotten up just among the various retail associations to get the gentlemen together to come down here.

Mr. CARLIN. What we are trying to get into your mind is: This committee is exceedingly anxious to help you along proper lines, but before they can do that they have got to know what you want. If you want to continue combinations in the form of a trust, or to have the right to conspire in restraint of trade, or to continue monopolies, of course, you would not get any help here.

Mr. MOOREHEAD. Certainly; I understand that.

Mr. CARLIN. And it is for that reason we are trying to get at exactly what you do want. It turns out the Government, through the Attorney General's office, I suppose, has brought suit against your association.

Mr. MOOREHEAD. One of the lumber associations; not mine—one of the retail lumber associations with its headquarters located in Minneapolis.

Mr. CARLIN. They are doing the same thing you are doing, however, are they not—the one that suit has been brought against?

Mr. MOOREHEAD. I am not an officer in any lumber association. I am a retail lumberman, but not an officer or official of any kind in any lumber association and have not been for a good many years.

Mr. CARLIN. Have you a local association in your town of lumbermen?

Mr. MOOREHEAD. No, sir. As I said to you a while ago, I have not been on intimate terms with my competitor in seven years.

Mr. CARLIN. How many competitors have you in your town?

Mr. MOOREHEAD. Just one.

Mr. CARLIN. And you and he have not been able to get together?

Mr. MOOREHEAD. No, sir. And I would say further, in four times out of five, not only in the lumber business, but in any other line—groceries, hardware, or anything else—the merchants are fighting for business rather than maintaining a price. Now, do not get away from that thing, gentlemen, because it is true. They are not only fighting among themselves, but they are fighting these mail-order houses away from home.

Mr. CARLIN. Your association wants the society to fix a reasonable price?

Mr. MOOREHEAD. I have no hope of anything of that kind. If we had the right specifically and knew we could make a common fight for our rights without violating the law, that is all we want. We can not afford to violate the law. We have not the money to fight those things out. We have not the money to fight even collectively, and what we want, gentlemen, is: Do not permit the amendments to the Sherman law to say that everything that a competitor may do must be kept secret and that it is a felony to tell the truth about your competitor. If you do you are going to give the big business and the mail-order houses of this country just what they want.

The CHAIRMAN. Have you heard any suggestion that any such thing as that was contemplated by anybody? Have you seen any bill formulated anywhere?

Mr. MOOREHEAD. Yes, sir; the papers have been full of it—that that had been suggested to this committee.

The CHAIRMAN. Where and how?

Mr. MOOREHEAD. That it be unlawful for anyone to reveal—obtain any information or reveal any information he may obtain about his competitor's business.

The CHAIRMAN. On the contrary, every measure of the sort here provides for publicity.

Mr. MOOREHEAD. Yes, sir; I hope you will.

The CHAIRMAN. Well, there are measures here for publicity. No such suggestion as you made a while ago has been made to the committee.

Mr. MOOREHEAD. I think it will come, Judge. It is in the interstate-commerce act that it is a felony for me to gain any information from a railroad agent about any shipment of goods. It is a felony for the agent to give it to me, and it is a felony for me to use it after I get it, as a private citizen, under section 15 of the interstate-commerce act.

Mr. CARLIN. It is a felony to get it from that source, but it is not a felony for you to get it under the act by the Government, obtained for your use.

Mr. MOOREHEAD. Mr. Chairman, I would like you to hear now from Mr. Stebenthal.

STATEMENT OF MR. F. R. STEBENTHAL, OF EAU CLAIRE, WIS.

Mr. STEBENTHAL. Mr. Chairman and gentlemen of the committee, I wish to thank the committee for the privilege—perhaps it is one in a lifetime—of appearing before such a distinguished committee which has really in their hands the future welfare of the small towns and the small dealers of the country.

Now, I represent some 35 of the dealers who are directly on the firing line with the producers of the country—the farmers. We hand out to them the implements, machinery, with which they till the soil to produce the wealth of this country, and I want to say to you that under the acts of Congress as they stand to-day, which handicap us and tie our hands, the retail implement business is not a profitable one. Statistics will show that 25 per cent of the retail implement men in this country go out of business each year. The president of the National Implement Manufacturers' Association, Mr. Craig, of Wisconsin, said the other day the last thing he would offer to one of his boys as a business venture would be to enter into the retail implement business; and, in order to make a success of it, it would require more brains and tact than it would to be the manager of a railroad.

Gentlemen, only two implement dealers out of every hundred in these United States make a competency sufficient to do them in their old age. Why? Because of the competition that we are compelled, under the laws, to accept without any defense whatever, without anything to defend ourselves with. The organization I represent—I want to read to you what it is composed of, just to disabuse your minds of the fact that we are here representing a class of men that wishes you to give them any special favors. We only want the right to make an honest living, without the laws that are placed upon the statute books to govern big business being used against the little business that everybody knows it ought to be the privilege of you gentlemen to protect.

The small town and the small dealer are up against a great deal harder competition than those gentlemen told you about. Yet we want to be law-abiding. I want to show you we are organized only for one purpose. We realize the convenience and the necessity of the retail implement, vehicle, and hardware dealer in every community. We are interested in the promotion of the general welfare and the production of the retail implement, vehicle, and hardware business. We recognize the legal right of the manufacturer, the wholesale dealer in implements, vehicles, and hardware to sell in whatever market and to whatever person he pleases, to any purchaser and at whatever price they see fit.

Now, we restrict no one. Our meetings are entirely open. We get together for the purpose of discussing the questions that are inimical to our business and for our best interests. We only meet around the table the same as you have here, and we talk about matters of

business. We never attempt to fix a price. We know it is unlawful. Such a thing has never been done by the Implement Dealers' Association. Yet the great Government of the United States comes in and takes all of our books and records and investigates us to see if we are not a trust in restraint of trade. We are continually hampered by agents—I think of your Bureau of Commerce—that are doing that. They attend our meetings. We invite them very freely. They never have been able to find anything against us. We have never been indicted; we do not want to be. But what we want at your hands is just the consideration you would give to one of the dealers in your home towns when you knew of their struggles.

We have no form of legislation to give you, for the reason we are not attorneys; we are not Congressmen; we are ony hard-working men who stand for their own interests and would like the opportunity, simply the opportunity, to do what they believe to be right at home and to gain an honest living. This gentleman (Mr. Nelson) lives in my State. Now, then, he asked if he could buy from his dealer at home, his wholesaler. Yes. But would it be right for the wholesaler to give him the wholesale price and charge me the wholesale price, or to charge him the retail price?

We only ask at your consideration, gentlemen, that in getting after the big business—which we are with you on in every particular—do not kill the little business in doing so.

Mr. CARLIN. We are with you on that, and are not going to do it.

(Thereupon, at 4.30 o'clock p. m., the committee adjourned until to-morrow, Thursday, February 5, 1914, at 10.30 o'clock a. m.)

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Thursday, February 5, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. Mr. Finneran and Mr. Nixon are here this morning and desire to be heard. Gentlemen, which one of you will proceed first?

Mr. STEWART. Mr. Chairman, Mr. Finneran will speak first.

STATEMENT OF MR. JAMES F. FINNERAN, OF BOSTON, MASS.

Mr. FINNERAN. Mr. Chairman and gentlemen of the committee, I am president of the National Association of Retail Druggists. I am only an ordinary, everyday retail druggist and have to work for a living, like all the rest of them. Perhaps I may not be able to explain clearly some of the points that I would like to bring out, and if I do not explain them thoroughly I hope you will pardon my lack of knowledge of official procedure in matters of this sort.

Our organization is composed of 15,000, in round numbers, retail druggists, mostly east of the Mississippi River. Seventy-five per cent of those men conduct what is known as the family drug store, any I think you gentlemen all agree that there is a necessity for the family drug store. The other 25 per cent are in the larger centers. We are troubled very much by what we call unfair competition

through a line of stores commonly called chain drug stores. There are many of those systems in various parts of the country. Prof. Nixon—who, by the way, is chairman of our legislative committee—comes from Massachusetts and knows about New England and about these chain drug stores there, and I expect he will give the members of the committee many of the details regarding these stores. I desire to make a general statement in behalf of our association.

For 15 years we have believed that the sort of competition brought against the small man by these so-called cut-price stores was unfair. In advertising they claim that they are enabled to buy goods in large quantities and thereby are enabled to undersell us. It is a fact that no one to-day actually knows the bottom price on many commodities which are sold in the drug store. There is a supposed retail price, but the public does not know what the retail price is, because the price printed on a package of Gillette blades, a package of Baker's chocolate, or a package of patent medicines, as sold in the drug store, indicates absolutely nothing to the public. They really do not know what the price is at all, because in one store it is 49 cents, in another store it is 39 cents, and in some cases 33 cents

There are all sorts of rebates given. I am a retailer in the city of Boston and have 34 employees in my store, so that you will understand that I have a fairly large business, and I am frank to say that we get rebates. But the question in our minds—and I think it is the question that is in the mind of every merchant—is, What is the price, after all? We use the slang expression, "gunning around" from one wholesale house to another and from one manufacturer to another in order to find out if possible what is the best price at which we can buy certain goods. Now, our point is this: Would it not be an absolutely fair proposition that the manufacturer of an article should have the right to say what the price is all along the line? For instance, railroads say that if you send a carload of freight over the road it will cost you so much for a certain distance, and would it not be a fair proposition for the manufacturer to say that a carload of his goods could be bought at a given price and that every one might know it? The same thing is true if a man takes a half of a car or takes a quarter of a car, and the same should be true of the various trade-marked, copyrighted, and patented articles that are sold in the retail drug store of to-day.

I think all of you gentlemen must be acquainted with such a store, because you must patronize one. I do not see how any one could get along without patronizing a retail drug store, because it carries such a multiplicity of merchandise, much of which is trade-marked, patented, or copyrighted. While perhaps the prices do not always interest you as to whether an article costs 35 cents or 50 cents, still I think you at times may have a feeling that you do not know just what the price is, because you buy it at various prices.

Now, let me state the position of a retailer. For instance, he is enabled, we will say, to sell Gillette razors at $5. He has a very friendly feeling toward that manufacturer because he makes a reasonable profit, but immediately the profit is cut out from under him by what we consider unfair competition he loses interest in that razor, and rightly so, because it does not make any difference whether he is a big man or a little man he must have profit.

The CHAIRMAN. You have spoken about the Gillette razor. The concern that manufactures that razor sells it to you under a contract that you will sell it in the retail trade at a particular price, does it not?

Mr. FINNERAN. They did; but as I understand it, under the Sanatogen decision of the Supreme Court, that contract is not worth the paper it is printed on. As a matter of fact, in our own city Gillette razors were sold at $3.37.

The CHAIRMAN. I know about that decision, but do they undertake to do that now? That is what I am trying to get at.

Mr. FINNERAN. No; they sell them at $5 in Boston, but it is one of those so-called gentlemen's agreements that enabled them to get it back, and it is nothing else than that.

The CHAIRMAN. They still have a gentlemen's agreement?

Mr. FINNERAN. Oh, yes; and the gentlemen's agreement goes. It is simply a gentlemen's agreement that you will sell it at $5 and thereby make some profit.

The CHAIRMAN. What do you pay for Gillette razors when you buy them?

Mr. FINNERAN. The price of a Gillette razor is $5, and a man buying a small quantity gets 25 per cent off the retail price, making it $3.75. In quantities there is 10 and 5 off additional, bringing it down to approximately $3.33, I think it is.

The CHAIRMAN. Do you know what it costs to manufacture that razor?

Mr. FINNERAN. I have not the slightest idea.

Mr. DANFORTH. Those men, then, sell at just what they pay for them?

Mr. FINNERAN. Yes.

Mr. DANFORTH. $3.33?

Mr. FINNERAN. Yes, sir.

Mr. DANFORTH. And they are selling for that price in Boston?

Mr. FINNERAN. No; not now, because, as I say, there is a gentleman's agreement. A representative of the Gillette people went about and said, "Gentlemen, there is no fun for anybody in selling Gillette razors at less than cost to the ordinary small man, and if they are sold at less than cost we get the ill will of everyone. We want the good will of the dealers; we want them to sell our razors and sell at a profit. We believe more are sold at $5 than are sold at $3.33, and we believe more will be sold at $5 than at $3.33."

Mr. FLOYD. Previous to the decision of the Supreme Court holding that that kind of a contract was unlawful, what kind of contracts did you have with the Gillette Co.?

Mr. FINNERAN. We had no contract, except this little statement as made by your chairman.

Mr. FLOYD. In other words, you bought the razors with the understanding that you would sell them at the price fixed by the company from which you bought them?

Mr. FINNERAN. Yes, sir.

Mr. FLOYD. If you violated that understanding what did they do? What was the punishment imposed upon you?

Mr. FINNERAN. A suit at law, and the court would decide what the damages were.

Mr. FLOYD. Was it not more than that? Was it not understood that they would not sell you any more razors?

Mr. FINNERAN. I do not know as to that; I would not like to say that because I do not know. To answer your question perhaps a little more in detail, I do not see how they could prevent that, because their razors were sold through jobbing houses, and it would be very easy for a man to send to a jobber, without giving his name but sending his money, and getting the razors at the 25 per cent off.

Mr. FLOYD. You paid for your razors in advance, but still the man you bought them from fixed the price at which you should sell them?

Mr. FINNERAN. The manufacturer fixed the price.

Mr. FLOYD. That might be nice for the manufacturer and for the retailer, but what do you think about the consumer?

Mr. FINNERAN. I think it is absolutely fair to the consumer.

Mr. FLOYD. Does it not absolutely destroy competition?

Mr. FINNERAN. It seems to me, Mr. Congressman, that it would increase competition.

Mr. FLOYD. How could it increase competition among that class of razors? If they all had to be sold at the same price by every one, how could there be any competition?

Mr. FINNERAN. Well, you mean increased——

Mr. FLOYD (interposing). So far as the consumer is concerned.

Mr. FINNERAN. You mean, increased competition in Gillette razors, or between Gillette razors and other razors? I want to get that clear.

Mr. FLOYD. You have expressed your view about it. What do you think the consumer thinks about that?

Mr. FINNERAN. I think the consumer believes, when he is buying a Gillette razor at $3.33, that he is getting a bargain, and he is; there is no question about that. But the point I want to make is this: That when he comes in to buy a Gillette razor at $3.33 it is almost impossible for him to get it. In other words, he has to fight to get what they advertise at a reduced price in order to bring him in the store, and when they get him there they try to substitute something else.

Mr. CAREW. What do you think he thinks about it when, after paying $5, he hears that another fellow has bought it for $3?

Mr. FINNERAN. I think he feels badly; I think he feels badly nearly $2 worth. But there should be a price at which every one would sell it. I do not care whether it is $3, $5, or 50 cents. But it seems to me, as far as the competition end of it is concerned, that if Gillette razors were sold at $5, and they could not be bought for any less than that, that some inventive genius would get up another razor and sell it in actual competition with the Gillette razor, with the ultimate result that the razor that gave the best value for the money would be the one that would sell.

Mr. FLOYD. Suppose the manufacturer of this new razor did the same thing that the other manufacturer did? Do you not think that the consumer gets the worst of it under that kind of a system?

Mr. FINNERAN. I do not think that is the way it works out.

Mr. CAREW. How would you feel if bakers charged a dollar a pound for bread?

Mr. FINNERAN. I do not think you could get them to do it.

Mr. CAREW. But suppose they did it?

Mr. FINNERAN. I would feel very badly if they did it.

The CHAIRMAN. As you know, in times past, in some communities where bread was scarce, they put up the price enormously and there have been bread riots.

Mr. FINNERAN. I think that is absolutely true.

The CHAIRMAN. But you said they would not do it.

Mr. CAREW. Do you know whether or not the Gillette people had any thing to do with the instigation of the barber strike in New York City, so that men would be obliged to shave themselves with safety razors?

Mr. FINNERAN. I do not. That is a thought that never came into my mind.

Mr. NELSON. Your proposition is to let the wholesalers suggest the price of products so they will be uniform throughout the country?

Mr. FINNERAN. My proposition is that every manufacturer shall say to the public what the price of his goods shall be.

Mr. NELSON. And that the druggist shall follow that price?

Mr. FINNERAN. From start to finish.

Mr. FLOYD. Let me pursue the question a little further. You buy from the wholesaler or manufacturer and you insist that he should have the right—although you pay for it when it becomes your property—to fix the price down to the consumer?

Mr. FINNERAN. I do; yes.

Mr. CAREW. For your benefit, so that you will make a larger profit?

Mr. FINNERAN. I think that is true. There is an economic proposition there.

Mr. FLOYD. What would you think of a system in this country which allowed a man who raised horses or cows to fix the price at which his horses or cows should be sold down to the last purchaser?

Mr. FINNERAN. I think he does that now.

Mr. FLOYD. Do you mean that when you buy a horse from a man he should have the right to fix the price at which you are to sell that horse in the future?

Mr. FINNERAN. No; I only mean between himself and the purchaser.

Mr. FLOYD. Should that be allowed after you get the property in your hands? I concede that if a man furnished goods to you as an agent that he might very well control the price at which you sold them, but when you pay your own money for the property and it is yours, just as absolutely as your house or your horse, what right has a man to insist that he should fix the price at which the property is to be sold to subsequent purchasers, and even to the last consumer?

Mr. FINNERAN. If it is a good thing for the public it is all right, and we have always contended that it was.

Mr. NELSON. I would like to have you show how it is a good thing for the public.

Mr. FLOYD. I will concede that it is a good thing for the manufacturer and a good thing for you, but what I would like to be enlightened upon is how it is a good thing for the man who has to pay the arbitrary price fixed by the manufacturers.

Mr. FINNERAN. As long as we have mentioned Gillette razors—we can mention any quantity of things along the same line——

Mr. CAREW (interposing). You could say Armour's hams.

Mr. FINNERAN. Yes; or Heinz pickles, because I think they are interested in those things. As we see it, the man who advertises goods at cut prices has absolutely no intention of selling them to the public unless he is absolutely obliged to do so. In other words, when you enter their stores——

Mr. CAREW (interposing). Leave him out. Let us deal with the man who is buying it to use it.

Mr. FINNERAN. I was coming to that; I can not explain the second part of it without making the first part of it clear.

Mr. CAREW. We agree with you on your first proposition. It is a good thing for everybody who sells it.

Mr. FINNERAN. But the point is that everybody does not sell the razor at $3.33, and ultimately the man who desires to buy it is really, by cajolery, or by something else, induced to buy something else in its place. It is a clear case of substitution.

Mr. CAREW. You are anxious to protect him against his own folly?

Mr. FINNERAN. To protect the public against the ingenuity——

Mr. CAREW (interposing). Of your own trade?

Mr. FINNERAN. Yes; that is just the whole proposition; that is just exactly what happens.

Mr. MCCOY. Is not this the proposition that is involved in the Gillette safety-razor matter: The Gillette people, for instance, spend thousands and hundreds of thousands of dollars in advertising, and that is an expense of the business which a man with another article does not go to at all. Gillette advertises his razor and makes a market for his razor by advertising. Then, we will say, a druggist has a lot of other goods besides Gillette razors which he wants to sell but which have not been advertised in that way, and in order to get people in to buy those other things he sells the Gillette razor at what it costs him or at a less price. In other words, he steals the advertising expenses of the Gillette people in order to sell his other goods at a profit, and it really involves a question of unfair trade and unfair practices.

Mr. CAREW. Mr. McCoy, let me ask you a question. Do you understand that this gentleman is here to protect the Gillette safety razor people——

Mr. FINNERAN (interposing). Not particularly.

Mr. CAREW (continuing). From having the benefits of their advertising stolen by these various druggists?

Mr. MCCOY. No; he is here, as I understand it, for the purpose of asking that the Gillette Razor Co., the Kodak Co., and all those concerns that have created an enormous business—and, therefore, are able to sell their goods for less than they otherwise would sell them—shall be able to keep on doing that—that is, those companies have created a business through advertising and have thus been able to sell goods at a less price. I believe, myself, that it reduces the price of razors, kodaks, and all those things, because these men have built up such an enormous business.

Mr. NELSON. You think that by virtue of this advertising the Gillette Razor Co. has reduced its price?

Mr. MCCOY. I imagine it has, because every concern that builds up an enormous business is able to sell cheaper, and probably does sell cheaper.

Mr. NELSON. Is it not more true that by advertising it is able to keep up its price?

Mr. MCCOY. It is able to keep it up and it is able to keep it down, if you will permit the paradox. But it is true that a man who is making 50 articles can not begin to sell them as cheaply as if he were making 5,000,000 of them and selling them. But it seems to me that it is just like stealing the advertising which a man has done to create a market for his goods. It is very much like stealing his patent or his copyright.

For instance, a case was decided somewhere in Illinois or Indiana the other day where a man had started to advertise his goods by putting this sign in the trolley cars, written in one word, "Stopyourkicking." Everybody knew, of course, when they saw that sign that it was to be followed by his advertisement of whatever it was he wanted to sell, but before he reached that point some smart man came along and put up a sign, saying, "Stopyourkicking," and then put in his own advertisement. That was a clear case of larceny. The court decided that under the rule which it applied in unfair competition cases that it would not enjoin the man, but I think that was a clear mistake. The man who came along and got the benefit of that advertising took the other man's money as clearly as though he had put his hand in his pocket. It is certainly so in the case of these Gillette razors, and all these other cases where they attempt to fix the price, and that is only possible in connection with goods advertised at large expense; it is only in those cases where there has been an enormous expense for advertising.

The CHAIRMAN. It might be well for the committee to hear the witness.

Mr. MCCOY. Well, of course, if the members of the committee can not develop things which the witness suggests, all right. The other members of the committee were talking about the matter, and I thought I would. I beg the committee's pardon. I will quit.

The CHAIRMAN. I did not mean it in that way, but I hope the members of the committee will confine themselves to questions directed to the witness.

Mr. FLOYD. I want to ask one question in connection with that. Assuming your premise to be correct, do you think that the Gillette Co. causes the general public to pay for that advertising?

The CHAIRMAN. This debate between Mr. Floyd and Mr. McCoy will be entirely in order when we meet around the committee table to discuss the matter among ourselves, but I do not think it is fair to the witness that we precipitate a discussion of this sort and deprive him of his opportunity of being heard. That is what I had in mind.

Mr. MCCOY. I wish the witness to consider what I said in the nature of a question, and I will now ask him whether my argument is sound?

Mr. FINNERAN. I think Mr. McCoy's argument is sound, and as he has covered it so thoroughly, I do not see any necessity for going into that question.

Mr. FLOYD. If Mr. McCoy's argument is sound and the man who is competing with the Gillette Co. is getting the advantage of their advertising, or, as Mr. McCoy says, stealing their advertising, do you not think it is better for the general public that that should occur

than that the Gillette Co. should force the public, by these uniform prices, to pay for all of it?

Mr. FINNERAN. I will agree to that if that is the correct condition of affairs as they exist, but I do not agree that it is the correct condition of affairs.

Mr. FLOYD. My question was based on Mr. McCoy's argument.

Mr. McCOY. I want to say, in answer to Mr. Floyd, that what I said about bringing the public into business places to buy goods would not apply to getting the public in to buy other razors. What they do is to sell not only the Gillette razors, but dozens of other things that they advertise at the reduced price, a well-known article which is thoroughly advertised, in order to get people in not to buy a competing product, but to buy other things which they sell in their business.

The CHAIRMAN. I would suggest that we let the witness go on now.

Mr. NELSON. I want to ask the witness a question. If I follow you correctly, you wish to have what we might call a trade agreement; that is, the wholesaler to suggest the prices at which you would all sell some article in your drug store—is that it?

Mr. FINNERAN. Well, not just exactly that.

Mr. NELSON. What is your point, then?

Mr. FINNERAN. My own idea is this: Say, for instance, you are a manufacturer of a certain article; you alone, without any combination with these other gentlemen who are manufacturing similar or dissimilar goods, if you please; you alone decide that your article should be retailed at $5; to your mind it is an article of merit and you believe that it should be advertised at that price. Now, I believe that you——

Mr. NELSON (interposing). And it is your idea that he should fix that price for the retailers?

Mr. FINNERAN. He would fix it all along the line.

Mr. NELSON. And they would all agree to that price?

Mr. FINNERAN. They would have to if the law was to that effect.

Mr. NELSON. Suppose that was a very excessive price, and almost so that it would prevent the ordinary man from paying the price? Would you not have somebody to regulate that or to say whether it was excessive or not?

Mr. FINNERAN. I would have absolutely no objection to that.

Mr. NELSON. Then you would consent to the fixing of a maximum price in your business?

Mr. FINNERAN. Yes; I have absolutely no objection to that at all. But I do think, as to the $5 proposition—to answer this gentleman directly—as I said before, that competition would easily adjust it. If a man were selling something at $5 that was not worth it he would soon find a competitor selling something else at $3, and that $3 article would naturally be the one that would sell. It would take but a short time for the public to become acquainted with the value of the two articles. That is true of any article; I do not care whether it be food or drink, or something to wear, or something in the line of medicines.

Let me give you a little experience of my own. I wanted to buy a well-known make of thin summer underwear. I knew it was advertised in the newspapers, but I did not know it was advertised

in that particular store at cut prices. However, that make appealed to me, and I went into that store to buy it. I wanted two suits of my particular size and they were laid out before me, and then immediately I was shown something which could be bought at the same price and that was said to be a great deal better. Now, I did not know that they were being sold at 38 cents; I knew they were being advertised in the newspapers at 50 cents a garment, and I was perfectly willing to pay that. But I was worked on very, very hard, and it was with considerable reluctance on the part of the salesman that I got my two suits of thin summer underwear, paying the cut price, which I did not know anything about in this particular case. Now, I compared those right there. That is a case in which a comparison can be made, and——

Mr. CARLIN (interposing). Did the retailer make a profit at the cut price?

Mr. FINNERAN. No; there was absolutely no profit at all. They cost something like $4.50 a dozen and were sold at 38 cents; they cost him, I think, about 37½ cents. That is the trouble in the retail drug business. We are selling to-day, in order to meet competition in Boston, articles which cost us $8 a dozen at the regular jobbing price.

That is what the small man is compelled to pay because he can not buy in large quantities. Now, we are selling some of those articles at 59 cents which cost us 66⅔ cents. We are selling any number of articles along that same general proportion, and articles which are listed at $1.75 a dozen we are selling at 11 cents. My particular firm is doing that because we are right in the hotbed of the chain-store proposition in Boston. We happen to have 12 stores in one chain and 5 or 6 in another in Boston alone. Recently they had a cut-price war in cigars and cigarettes. They took well-known cigarettes and well-known brands of cigars and sold them at ruinous prices. The result was that everyone else had to stop selling those brands and the public was injured in that way and the manufacturer was injured also, because no man can do business in a small way, or in a big way, unless he makes some profit.

Mr. NELSON. What do they do with the prices after the cutthroat war is over? Do they raise them after they have driven out competition?

Mr. FINNERAN. Yes; that is the modus operandi always. You can follow that away back to the time when the American Tobacco Co. first started. That was their process of eliminating competition, cutting prices until they got competitors out of the way and then up went the prices. I think you gentlemen are absolutely conversant with all of that.

Mr. MORGAN. Are you here asking legislation; and if so, what kind of legislation do you want? I do not know that I quite understand.

Mr. FINNERAN. We would desire that in some way the price be fixed on an article from the time it is manufactured until the time it gets to the consumer, and that the price would be made public.

Mr. MORGAN. Do you want us to pass a law providing that every manufacturer shall fix prices?

Mr. FINNERAN. Yes; if he cares to and they are branded goods.

Mr. MORGAN. You want us to give him the privilege of fixing prices?

Mr. FINNERAN. Yes, sir.

Mr. MORGAN. Do not manufacturers have that privilege now?

Mr. FINNERAN. I understand not.

Mr. MORGAN. There is no law against it, is there?

Mr. FINNERAN. I do not know how they can do it, because, as I understand, the Supreme Court has said they can not do it.

Mr. CARLIN. The Supreme Court, in the Strauss case, decided in December, 1913, said they could not contract to do it.

Mr. MORGAN. The Supreme Court decided you could not enforce that contract, but that still gives everybody the privilege of making what this gentleman calls gentlemen's agreements, does it not?

Mr. CARLIN. But they can not enforce such agreements.

Mr. MORGAN. But in effect they do enforce them, he says.

Mr. FINNERAN. No; they do not enforce them, because gentlemen do not always stay so. Something happens. I do not know what does happen, but perhaps they doubt the word of each other.

Mr. MORGAN. Do you base this on a principle of public good or do you think——

Mr. FINNERAN (interposing). Public good, purely and simply.

Mr. MORGAN. You think a manufacturer ought to have the right to contract to sell his article at the price he wants it sold?

Mr. FINNERAN. Yes; first, for the public good, and, secondly, for the sake of the business. I have been in the drug business for a great many years, and I have personally been all through the various phases of this cut-price proposition. I have done my share of what is called substituting, and I have been obliged to do it in order to live.

That is what all these large chain-store propositions have been obliged to do; they have been obliged to substitute. We all hire the cleverest men we can behind the counters to convince you that the particular article you come in and ask for is not what you ought to have.

Now, the National Association of Retail Druggists do not want that to continue. We would like to be able to hand to you anything you come in and ask for, and not be obliged to cajole you and try to force you into taking something which perhaps is not as good.

Mr. MORGAN. As I understand it, then, you want a law that will legalize those contracts when they are made?

Mr. FINNERAN. Yes.

Mr. MORGAN. And you think that with such a law there would still be free competition and that each man could make his own profit?

Mr. FINNERAN. Yes, sir. I have talked with manufacturers, and every man who is an advertiser and every man who has a trade-marked article would be delighted to have everyone know that his goods were not being slaughtered and that they could get just what they were paying for. You realize that that is not so now.

For instance, I observe that Mr. Ingersoll advertises in the papers to a considerable extent, but when a man buys an Ingersoll watch at 75 cents he does not believe he is getting a dollar watch. Men do not believe that; they do not believe they are getting the dollar watch when they buy it for 75 cents. Now, Mr. Ingersoll, as a manufacturer, does not want any misunderstanding in the minds of his possible customers as to whether they are buying a 75-cent watch or a dollar watch.

Mr. FLOYD. While you are talking about watches, will you permit a question?

Mr. FINNERAN. Yes, sir.

Mr. FLOYD. I was told by a reputable jeweler—and that was before this decision was rendered which has been referred to—that the wholesalers not only fixed the price to the jobber, but fixed the price to the retailer—that is, the price at which he must sell it in the market—and that if he violated that agreement the result was that he could not buy another watch in the United States.

He showed me a card that was sent out by the establishment which fixed these prices, the retail prices, and they offered a reward of $10 to any person who would furnish them reliable information as to any of their customers who had been guilty of fixing their own prices. Do you know of any such system as that under the old practices?

Mr. FINNERAN. Not as far as watches are concerned, but I do know about other things.

Mr. FLOYD. Do you know about other articles?

Mr. FINNERAN. Yes.

Mr. FLOYD. He said to me: "I buy these watches and pay my own money for them, but if I decide to go to a larger town and want to dispose of this stock and should dispose of it to my neighbors who have been my customers for years at prices which are not set by these establishments I could not buy another watch in the United States." Do you think that kind of a system is fair?

Mr. FINNERAN. Absolutely not. I think that if a man wants to sell out he ought to have the right to sell out in bulk.

Mr. CARLIN. Do you think that the manufacturer of the Ingersoll watch ought to have the right to contract with the dealer in the sale of his watch so as to prevent that dealer from selling anybody else's watch?

Mr. FINNERAN. No, sir; I think that is absolutely wrong.

Mr. CARLIN. We have a provision in the bill prohibiting that.

Mr. FINNERAN. Yes; I saw that, and I was very glad to see it in the bill. I think that is in the interest of the public, and that it is a very wise proposition.

Now, gentlemen, I think you must consider retail druggists a part of the public. There are 45,000 retail druggists in the United States; that is, proprietors of stores. That means, as far as proprietors and employees are concerned, 200,000 men in the retail drug business, most of whom are small men. Most of them have families, or they are a part of families whom they support. They have fathers and mothers that they must help, or they may have a wife and children to provide for. So that as a national association and as a class of men we are a part of the public, and I think we deserve some consideration from that point of view.

The small merchant, I think you gentlemen all agree, is a necessity; he is a necessity in order to keep competition up. If the small merchant in the line of groceries, in the line of cigars, in the line of drugs, etc., can not exist and can not be in your particular neighborhood because he is driven out by what I call unfair competition, it may be rather difficult at times for you to get what you need in the line of those things, and especially in the line of drugs. They do not have telephones all over the United States, and they do not have

messenger boys, even where they do have telephones, and in such an event you have to go yourselves or get some one to go for you.

The CHAIRMAN. If a man is driven out, as suggested by you, who takes his place?

Mr. FINNERAN. No one takes his place except the one big store that drives him out.

Mr. McCOY. What would you say about a bill that would require all patent medicines to have printed on their exterior a statement of the ingredients that they contained?

Mr. FINNERAN. I do not think that would be fair, because I think every man is entitled to the benefit of the work of his brain, and if that were required he would be really giving away to his competitors some of the things he had worked out.

The CHAIRMAN. Does not the pure food and drug law now require you to give some information?

Mr. McCOY. Only where you use poisons.

Mr. FINNERAN. Not only that, but in regard to a number of other things. There are probably about 500 items, when you take into consideration the article itself and its derivatives, that must be mentioned on the label, and not only that the article contains such a thing but how much it contains to the fluid or solid ounce. That we have no objection to. Incidentally I might say the druggists had something to do with the framing of that. I do not mean to say that we dictated to Congress or anything of that sort, but they suggested to various gentlemen who were in Congress at that time certain things that it might be proper to put in—that is, what might be stated as to the preparations and what might not be stated.

Mr. McCOY. Your general notion is that persons engaged in interstate commerce in these articles in which you deal should be required—as railroad companies are—to list their prices?

Mr. FINNERAN. Yes; so the public may know.

Mr. McCOY. And then stick to those prices?

Mr. FINNERAN. Yes, sir. We believe, as I said before, that it would be fair to everyone to do that?

Mr. DYER. You are connected, I believe, with the retail druggists' association?

Mr. FINNERAN. Yes, sir; I am president of the National Association of Retail Druggists.

Mr. DYER. What has been the effect upon the retail druggists' trade because of the business done by mail-order houses through the parcel-post system?

Mr. FINNERAN. It has been very disastrous.

Mr. DYER. What portion of the trade would you say has been affected?

Mr. FINNERAN. Mainly in the smaller centers.

Mr. DYER. Not in the big cities, of course?

Mr. FINNERAN. No; mainly in the smaller centers. I think Prof. Nixon will tell you his experience in his own town, not especially as applying to mail-order houses, but as to the reduction in the sales of patented and proprietary articles now as compared with 15 or 20 years ago.

Now, gentlemen, I had no intention of particularly touching on many of these things, and perhaps I may have taken some of the thunder from my friend Nixon. I know he is much more interesting

to listen to than I am, but I do want to leave this feeling in your minds: In the first place, that I am only an everyday, ordinary, working druggist, and that I believe, after many years of study of the proposition, that cut prices and the giving of these various rebates, which enable these people to get different prices and better prices, is destroying competition. It is not making competition, but it is actually destroying competition.

Mr. CARLIN. We have a provision in the bill against rebating.

Mr. FINNERAN. But we wish you would go still further and make a provision which we believe to be fully as necessary as that, if not more so—that is, to make some provision whereby the prices may actually be known from the manufacturer to the public, just the same as you now have a law which makes a great railroad tell the public what it can do over its line in any ordinary case of business. A railroad simply says to a man, "We can transport a carload of freight, or a half a carload, or a quarter of a carload, a certain distance at a certain price."

We only ask that that same general publicity be given as far as the sale of merchandise is concerned, and that no secret rebates should be allowed any more than secret rebates are allowed in connection with the railroads.

Mr. CARLIN. Do you believe it would be better for the retail merchant to have his prices fixed by the manufacturers?

Mr. FINNERAN. Most assuredly, because in the last analysis he would then know what he could pay his employees. Now, a man does not know——

The CHAIRMAN (interposing). That is, on proprietary articles, you mean?

Mr. FINNERAN. A proprietary article; a trade-marked article or a copyrighted article. I do not know of any way you could go any further than that, but still I ask that you go as far as possible. I can not help the committee on that because I am not a lawyer.

Mr. FLOYD. Let me ask you this general question: In all those lines of industry where there have been great aggregations of capital has not that been the practice for the last 10 or 15 years, or at least until the decision of the Supreme Court which held it to be unlawful?

Mr. FINNERAN. Yes, sir; I think that is practically so. However, I do not know it to be so.

Mr. FLOYD. You want to restore the privilege you have been enjoying for several years?

Mr. FINNERAN. No.

Mr. FLOYD. Until the Supreme Court held it to be unlawful—is not that the fact?

Mr. FINNERAN. No.

Mr. FLOYD. Is it not a fact that in many lines of industry that is the precise thing that was done; that is, that manufacturers fixed prices to the jobber, to the retailer, and to the consumer? Has not that been done for the last 10 or 15 years?

Mr. FINNERAN. As I said before, I have understood that to be so, but I do not know it to be so.

Mr. FLOYD. Now, the Supreme Court, in the decision to which your attention was called by Mr. Carlin, held that that kind of a contract was an unlawful contract under the Sherman Act, and what you really want us to do is to legalize it.

Mr. FINNERAN. Yet the Supreme Court of the United States was not very unanimous in that decision. I do not want to criticize them at all, only——

Mr. FLOYD (interposing). There were three dissenting judges, I believe.

Mr. FINNERAN. Well, in the case I have in mind, I think it was four to five.

Mr. FLOYD. Well, if it is five, the decision would have been in your favor.

Mr. FINNERAN. The Supreme Court of the State of Washington has just rendered a decision in the case of a particular flour manufactured in that State. It was held that it was not collusion between the manufacturers of that flour and other manufacturers of flour to keep the price up.

Mr. FLOYD. I would not object to any man selling at any price as far as he himself is concerned; but what I object to is any company, any individual, or any association trying to control the price of an article after the ownership of it has passed into other hands. I do not think it is any of their business.

Mr. FINNERAN. That is just what the Supreme Court of the State of Washington has recently decided, that it is good business to do that.

Mr. FLOYD. But the Supreme Court of the United States has held that you can not do that in interstate commerce.

Mr. FINNERAN. I realize that. Now, gentlemen, I have taken up fully as much of your time as I expected to, and I will not talk any longer.

Mr. DYER. What is your judgment as to what should be done to retail druggists who violate the law, provided a law such as you advocate should be enacted?

Mr. FINNERAN. Some penalty should be provided.

Mr. DYER. You think they should be punished?

Mr. FINNERAN. Yes, sir. Not necessarily retail druggists, but any merchant, whether a druggist or some one else. I do not mean to say that I am talking about this question simply from the druggists' point of view; I think it applies to every small merchant.

I thank you very much.

STATEMENT OF MR. C. F. NIXON.

Mr. NIXON. Mr. Chairman and gentlemen of the committee, one of the late questions was somewhat along this line: Are not great monopolies built up by the maintenance of prices? Was that the question?

Mr. FLOYD. No. The question was this: For the last 10 or 15 years, in many lines of industry, have not manufacturers and wholesalers fixed prices at which their customers shall sell and also the prices at which retailers shall sell to the consumer? I asked whether that was not the fact.

Mr. NIXON. That may be possible in some cases, but it seems to me that against that you can put corporate monopolies, such as the Standard Oil Co. That monopoly was based entirely on ruinous cutting of prices, and it seems to me that the attitude that we, as retail druggists, should take is that our business should not be

monopolized along the same lines that the Standard Oil Co. has followed.

We submit that a retail monopoly is in process of making, by ruinous cutting of prices of trade-mark, copyrighted, and patented goods having an advertised price, that 94 chain drug stores of one corporation, 49 of another, and innumerable cigar stores are now operated on this basis. We further submit that it is better to prevent the formation of a monopoly rather than wait until it is an accomplished fact.

Mr. CARLIN. What would you say about the Sugar Trust—that there should not be any competition?

Mr. NIXON. I have no doubt that arguments could be used on both sides. In my State we had some independent oil dealers and the Standard Oil Co. came into that section and sold oil for a less price than the price at which it could be produced, simply to drive these people out of the markets. Now, it seems to me that that is unfair competition, but that is the basis of pretty much all of the great monopolies of this country. I would like to state to you briefly just what the condition is in New England and in New York State, a condition which, unless stopped, will eventually spread all over the country. We have in New England three great interstate corporations that are seeking to establish a monopoly in the sale of goods in which we are interested—the cigar-store companies and two great chain drug stores. Now, what is their method? So far as the proprietary articles are concerned they are used simply as a club for establishing business. To make it as brief as possible I will state what was done in the city of Lowell, Mass.

One of these great chain drug stores sent a man to Lowell, who stood in front of the principal store in Lowell for three weeks with a mechanical enumerator in his pocket counting the customers who went into that store to find out whether it was of sufficient caliber to interest them. They found that it was. They went to the owner or proprietor of the building and leased the store over his head, and the man knew nothing about it until he was given one month's notice to move out. It was the oldest-established business in Lowell. His father was there before him. In a month's time he was obliged to take up his bed and walk, if I may use the expression, and has gone onto a side street. In another store they did exactly the same thing, except that in this particular case, they did not get the store. But what did they do? They obliged the present occupant to increase his rent 50 per cent. In Cambridge, Mass., a druggist's rent was jumped from $7,000 to $12,000 because of pressure brought by these people. Now, if they do not succeed in obtaining locations they make a proposition to the owner of the building of such a character that if the present occupant decides to stay he will become a bankrupt. Now, when they got established in Lowell, what did they do? They took the proprietary goods, costing from $8 to $9 per dozen—I wanted to bring you an exact copy of the advertisement so that you would know that what I am saying is exactly so, but I was unable to get it, and I hope you will take my word for it—but those goods were sold as low as 49 cents per package, the wholesale dozen price of which was $8 or $9 a dozen.

Now, the question has been raised here, What effect will certain legislation have upon the consumer? If a consumer buys a package

of one of those articles he is certainly so much in, but if he buys anything else he pays a good profit. Is that a fair proposition? On the consumer's side, as Mr. Finneran has told you, perhaps 6 times out of 10 the consumer never gets what he asks for, as he is coaxed into buying something else sold at a big profit. They had, perhaps, so many dozen of a certain package that was advertised at 49 cents apiece for sale. The first customers get them, and the great mass of customers that come after them never get them, because the supply was exhausted. At 10 o'clock in the forenoon the supply is exhausted, and then they proceeded to sell some other articles on which they would make a profit.

Mr. CARLIN. Suppose we were to follow your argument to its logical conclusion, and fix the price of every article that is sold by every retail druggist, or allow it to be fixed at one given price, what would become of competition among the druggists?

Mr. NIXON. I do not ask for that.

Mr. CARLIN. I know; but you are asking it for patented and copyrighted articles. While you are only asking it for certain articles, others are asking it for certain other articles, and, in the last analysis, we will have the prices of every atricle in your store fixed and we will have the prices of every article in your competitors' stores fixed. In that event, I ask you, What becomes of competition?

Mr. NIXON. In answer to that question, I will say that I would like to see the retail trade of the country placed on exactly the same basis that the small manufacturer is placed by the United States law.

Mr. CARLIN. Are you willing to carry your argument to the last analysis and ask for price fixing on everything?

Mr. NIXON. No, sir.

Mr. CARLIN. Then you think price fixing on a few things would be good and on other things would be bad?

Mr. NIXON. I have asked it on particular lines of goods because it is simply used as a club to form a monopoly. I have here some statistics to show you what has been going on in the past 10 years, covering New England and New York State principally. There is a system of chain drug stores——

Mr. NELSON (interposing). What is that system? What is it called?

Mr. NIXON. It is known in New York as the Riker-Hegeman Co., and in New England it is known as the Riker-Jaynes Co.

Mr. NELSON. Are they together or are they separated?

Mr. NIXON. They are together, but they are operated under different names in different States.

Mr. NELSON. Who are they owned by?

Mr. NIXON. They are not owned by pharmacists.

Mr. NELSON. What is the rumor about them?

Mr. NIXON. The rumor is that Henry Flagler was president of this company before he died, and that they are owned by Wall Street financiers.

Mr. NELSON. He was a director of the Standard Oil Co. before he died?

Mr. NIXON. Yes, sir.

Mr. MCCOY. I remember he had an office in New York.

Mr. NIXON. Yes, sir. These people operate 94 stores.

Mr. NELSON. Might I pursue that inquiry a little further, because I want to see to what extent this combination goes? Is it not the understanding in the retail trade that the tobacco companies are operating in the same way?

Mr. NIXON. Yes, sir; they are controlled by the same people.

Mr. NELSON. In other words, the surplus money made by the Tobacco Trust is put into chain stores?

Mr. NIXON. Yes, sir; that is exactly what we claim. Now, they are operating 94 stores in this district. The financial reports state that they are doing a business of $17,000,000 a year, which makes an average of $180,000 a year per store. The ordinary retail drug store does a business of from $15,000 to $25,000 a year.

Mr. CARLIN. Will you permit this interruption? What this committee wants to ask of you is whether you approve or do not approve—and the question seems to be justified by your argument—a general price fixing of all commodities which enter into a retail drug business?

Mr. NIXON. No; I do not ask that.

Mr. CARLIN. Wait a moment; you have not heard my question.

Mr. NIXON. I beg your pardon.

Mr. CARLIN. Now, if you should favor that it would mean that your prices would be fixed and the prices of all others engaged in the retail business in the town in which you are located would be fixed, and I only ask you in all fairness if, under those circumstances, competition would not be entirely eliminated?

Mr. NIXON. I think it would.

Mr. CARLIN. Now, if we were to concede your request now and allow partial price fixing in the articles which you name, how could we in good conscience refuse price fixing in the articles which you do not name, but in which others are interested? It is the principle I am laying before you now.

Mr. NIXON. It is a difficult question to answer. Of course, as I said before, I do not ask for that ultimate——

Mr. CARLIN (interposing). We want to help the little fellow in business; we want to help him get big.

Mr. ALONZO A. STEWART. May I be allowed to answer that question? I think I am better able to answer than Mr. Nixon.

Mr. CARLIN. Yes.

Mr. STEWART. What I think these gentlemen are after is this: That in certain lines of commodities the Government has granted to the owners thereof a monopoly. Now, where the Government has granted a monopoly to the individual, such as a monopoly under a copyright, a patent, or a trade-mark, the Government should compel the owners of the protected article to make the public price at which they sell to the public, so that every man who is compelled to purchase those things should know at what price he must buy them, and that no secret rebate is being paid.

Mr. CARLIN. I understand you are in favor of a partial price fixing and you want it confined to patent articles and copyright articles. But I am discussing the principle. What more reason is there for fixing the price to the consumer of one article than there could be for fixing the price to the consumer of another article? If price fixing is a good thing it ought to go all the way down the line, and if it is a bad thing it ought to stop.

Mr. STEWART. In reply to that, if monopoly is a good thing along certain lines, which the Government grants, why not all the way down the line?

Mr. CARLIN. Yes; but monopoly is not a good thing under any circumstances, and therefore it ought not to be permitted.

Mr. MCCOY. If you will pardon me, I think that you and Mr. Carlin are talking about different propositions. Your contention, as I understand it, is that in those articles on which you can get patents or copyrights or trade-marks, you claim that the Government should provide that there should be an advertised schedule by the manufacturer of those articles?

Mr. STEWART. Yes, sir.

Mr. MCCOY. But you have not gone to the extent of contending that those manufacturers should fix the price at which there should be a resale?

Mr. STEWART. That is a question to be decided.

Mr. MCCOY. There are two propositions—one is that he should sell an article at a uniform price and the other is as to whether or not he should be allowed to fix the retail price.

Mr. STEWART. Yes, sir.

Mr. MCCOY. Your statement applies to one class.

Mr. STEWART. Yes, sir.

Mr. MCCOY. As I understand you, as in interstate shipments the railroads are required to schedule their rates, so in interstate commodities the manufacturer should be required to schedule his rates. Then would come the question after that as to whether or not he would be allowed to fix the price of the resale of those goods.

Mr. STEWART. That is what I am saying.

Mr. CARLIN. Now, you, perhaps, have not read this bill.

Mr. STEWART. I have.

Mr. CARLIN. Because if you only want to go as far as Mr. McCoy indicates, the bill requires that now.

Mr. STEWART. Not altogether; not the publicity feature of it.

Mr. CARLIN. But it does compel the price to be uniform?

Mr. STEWART. Yes, sir.

Mr. CARLIN. And you approve of that?

Mr. STEWART. Yes, sir.

Mr. CARLIN. And you go a little further and fix the price at which the wholesaler should sell to the retailer and the price at which the retailer should sell to the consumer?

Mr. STEWART. Yes, sir.

Mr. CARLIN. Now, if we are going to do that with these few articles which you name—and the principle you contend is good—why should not we do it with the articles which you have not named? Will we not find ourselves in the last analysis fixing the prices of certain things and leaving other things unfixed? In the case of the lumber merchants who were here the other day, they desired to fix the price of lumber; and in the last analysis we would have to fix the price, I expect, of a pleasure smile.

Mr. STEWART. The only point of difference is that where the Government grants a special privilege in the shape of a monopoly they ought to couple with it the necessity of uniformity of price.

Mr. CARLIN. Is not the effect of the bill as we have drawn it—you say you have read it?

Mr. STEWART. Yes.

Mr. CARLIN. To compel uniformity in every class of commodity? Does not that of itself compel the publication of the price?

Mr. STEWART. Not necessarily.

Mr. CARLIN. Then, if there is a difference in price anywhere they would be indictable under the statute.

Mr. STEWART. Yes, sir; if you could find it out.

Mr. CARLIN. If you did not find it out, it could not be doing much harm.

Mr. STEWART. Well, I do not know about that. If you go as far as you can in transportation that is a step in the right direction.

Mr. CARLIN. You think that is a step in the right direction?

Mr. STEWART. Yes.

Mr. CARLIN. Now, in the second paragraph of the bill it prohibits contracts which would require retailers to sell exclusively one kind of goods. We are now prohibiting that and allowing the retailer to sell all goods in free competition. Do you think that is a good thing for the retailer?

Mr. STEWART. I think so.

Mr. CARLIN. Then the retailers agree with everything we have here as far as we have gone?

Mr. STEWART. Yes, sir.

Mr. CARLIN. They agree that it is a good thing.

Mr. STEWART. Yes, sir.

Mr. NIXON. That is very true indeed. Our only point is that we feel that under present conditions monopolies are being formed through the chain stores, which will drive us out of business. In Boston we have 20 of those chain stores. They pay the largest rentals of any stores in Boston, except, of course, the department stores, and at the same time they say that they are doing a benefit to the public by selling goods without profit. Now, how do they do it? Do they cut rates on everything? They cut rates, but on every single article of goods they make or get control of they get absolutely the full price for.

Mr. CARLIN. Now, Mr. Nixon, we want to be fair with you and I know you want to be fair with us. What we are trying to get you to say is this: If we were to go to the point that you ask, namely, to require partial price fixing in the drug business, how could we fix it in the grocery business?

Mr. NIXON. We have asked that only on trade-marked, copyrighted, and patented goods. Now, you might say that everybody could patent or copyright their goods; they might make such provisions, if they wished.

Mr. CARLIN. But if all goods were patented or copyrighted then your argument would apply to all.

Mr. VOLSTEAD. Of course, any article can be copyrighted.

Mr. NIXON. Yes, sir.

Mr. CARLIN. Now, we want to help you, and you say the legislation we propose will help you. I want you to think over the general problem that confronts the legislature and that confronts the country in the last analysis, and I ask you again, in all fairness, would you have us protect price fixing in your business and not do the same thing in the other businesses?

Mr. NIXON. No, sir.

Mr. NELSON. In other words, you are not going beyond the question of trade-marks?

Mr. NIXON. No, sir.

Mr. MCCOY. Let me ask you this, Mr. Nixon: Assuming that a man had a monopoly of an entire trade, you would not ask for that privilege for him, would you? To make it clearer, Ingersoll has a monopoly of the Ingersoll watch, but not of the watch business.

Mr. NIXON. Exactly.

Mr. MCCOY. Now, let us suppose that Ingersoll had a monopoly of the entire watch business. You would not then ask that for him?

Mr. NIXON. No, sir.

Mr. MCCOY. In other words, by granting the right to fix the resale price you do not thereby create a monopoly in any line of business, but you simply protect the man who is making one of fifty different articles of the same kind?

Mr. NIXON. Yes, sir.

Mr. MCCOY. Now, is it not the fact that in the case where they advertise goods to be sold at less than cost that practice is almost universally confined to those articles on which a large amount of money has been spent in advertising?

Mr. NIXON. Yes, sir.

Mr. MCCOY. So that practically what they are doing is to take away from the man the benefit of his advertising?

Mr. NIXON. Exactly; that is what it does.

Mr. MCCOY. So that if we should go the limit and permit every man to copyright or trade-mark his goods and then to provide that he might fix the resale price, competition in flour and hams, for instance, would still remain?

Mr. NIXON. Exactly.

Mr. MCCOY. But the man who made the best flour or produced the best hams would get the larger business, or the larger part of the business of his competitor who did not make as good flour or produce as good hams?

Mr. NIXON. Yes, sir.

Mr. MCCOY. In other words, competition would not be cut out, and the man who advertised his goods would be protected——

Mr. CARLIN (interposing). Oh, no; when it got to that point we would have fixed the price of every copyright or patent.

Mr. MCCOY. Let us suppose that there are 50 brands of smoked hams and that every one of them is protected by a trade-mark and that each one of the producers or sellers of the 50 brands of ham could fix the retail price. Now, I am assuming that they do not combine, but that each one fixes the price of his own ham. There would still be competition among 50 men.

Mr. CARLIN. But suppose the Government should fix the price. He says he wants this done just like the Interstate Commerce Commission fixes rates.

Mr. NIXON. Oh, no; I did not say that.

Mr. MCCOY. No; he said that on the analogy of the Interstate Commerce law they claim that the wholesaler should schedule his prices for the public; not to fix them, but to schedule them so that each man could buy on even terms with every other man.

Mr. CARLIN. Oh, I understand. Competition in each one of these articles would remain just the same, only each man would be able to get the benefit of his own advertising.

Mr. VOLSTEAD. In other words, if he paid $5 to put a patent on his goods, he could make a monopoly of them.

Mr. NIXON. On his own goods.

Mr. MCCOY. But not on all goods of a similar kind.

Mr. VOLSTEAD. But if each one puts a trade-mark on them then all of them could make a contract for the resale.

Mr. MCCOY. Each one could make a contract for the resale. That would not be a combination.

Mr. VOLSTEAD. They would not have to combine at all. The Washburn-Pillsbury and the other companies could go on and do the same thing.

Mr. MCCOY. But the competition would still remain among the 50 flour producers.

Mr. VOLSTEAD. No; it would not.

Mr. CARLIN. Under your system, Mr. McCoy, there would be no competition among the retailers in the same town on the same articles.

Mr. MCCOY. Oh, yes; because the retails instead of buying the Washburn flour would buy the other flour if it was better, or, if it was just as good, but lower in price.

Mr. FLOYD. Yes; but if there were 20 drug stores all selling listerine at the same price there would be no competition.

Mr. MCCOY. Not in listerine.

Mr. FLOYD. There would be none in Lyon's tooth powder.

Mr. MCCOY. None whatever; but Mr. Lyon has spent a million dollars in advertising, and why he can not get the benefit of his advertising I can not see. Now, he is protected in the use of the word "Lyon's" without any advertising.

Mr. CARLIN. But now the public has the right to buy it in any store it chooses at any price at which the store wishes to sell it. Now, we want to fix the price to the seller.

Mr. MCCOY. The suggestion is not that the Government fix the price, but that Mr. Lyon, having spent all this money, ought to get the benefit of his advertising.

Mr. VOLSTEAD. He gets it now.

Mr. NIXON. No; he does not.

Mr. MCCOY. He sells his tooth powder for $3 a dozen. Now, some man in the retail business will advertise to sell it for $2.50 a dozen. Now, why does he do it? Is he giving away 50 cents for the benefit of the public? Not at all. He is using the advertising for which Mr. Lyon has paid to get customers in his store so that he can sell to them other goods on which he does not cut the price at a very high price. In other words, he is stealing Mr. Lyon's advertising.

Mr. VOLSTEAD. That is competition.

Mr. MCCOY. No; that is theft.

Mr. CARLIN. Now, if you fix the price of those goods with which the public is familiar, to carry your argument to the last analysis, would you not have to go on and fix the price of those goods on which the public lacked information?

Mr. MCCOY. Now, suppose they do——

Mr. CARLIN (interposing). Then would you not destroy competition?

Mr. MCCOY. Not at all. You would not destroy competition in cotton goods, because there are hundreds of manufacturers in the cotton business manufacturing, for instance, shirtings. Now, I would protect every one of those manufacturers in his advertising, but you get your competition because here are fifty or a hundred cotton manufacturers who would compete with each other.

Mr. CARLIN. He is not talking about the manufacturer; he is talking about the retailer.

Mr. MCCOY. I know, and I am talking about the retailer. You say that this would prevent competition, but I say no. You do not see that 10,000 other people will compete with him in the cotton-goods business or in razors or listerine. The consumer does not need to buy Lyon's tooth powder; he can buy any other kind of tooth powder.

Mr. CARLIN. He can have his teeth extracted.

Mr. MCCOY. Yes, sir; he can go to the dentist and have them extracted.

Mr. NELSON. Mr. Nixon, what percentage of the drug-store trade is copyrighted or patented articles?

Mr. NIXON. Ten years ago the percentage in my business was in the neighborhood of between 40 per cent and 50 per cent of proprietary goods. To-day the percentage in my business—I know this statement is exactly accurate—is 7 per cent. Now, where has the rest of that 33 per cent gone? And yet I live 18 miles from one of those cut-rate drug stores.

Mr. NELSON. Your competitor is a chain of stores owned by capitalists who have made their profits in other lines of business—oil or tobacco?

Mr. NIXON. Yes, sir.

Mr. NELSON. Now, if you can not stand the competition on the patented or copyrighted articles, how can you stand it as to your articles which are not patented?

Mr. NIXON. Well, the advertising of a pound of Epsom salts for a certain price has no effect upon the public mind because they do not know what it is worth, but if you advertise a 25-cent article for 12 cents the public mind is impressed with the belief that you are selling all the other goods in the store on the same basis. I want to show you why the advertising of low prices on certain lines of goods does not do the same thing on other lines of goods.

Mr. NELSON. I want to know why they could not cut so low on everything as to drive you out of business.

Mr. NIXON. They can not because other goods have not a fixed retail price.

Mr. NELSON. Then, really, you can not stand the competition of these strong companies in other respects.

Mr. NIXON. Oh, yes; but this is the great club——

Mr. MCCOY (interposing). The answer to that is that if they sell everything below cost they will soon go out of business themselves.

Mr. NIXON. Yes, sir.

Mr. NELSON. But is it not a fact that because of their tremendous resources they can sell their goods very low?

Mr. NIXON. Yes; because of secret rebates. Some dealers buy certain goods for $8 or $9 a dozen, and if they buy it in large quantities they get a 10 per cent discount. The larger the store the greater the discount. My friend Finneran gets a greater rebate because he does a larger business. It is the same as in the railroad business, and I do not see why the same principles can not be applied to our line of business as in the other lines of business.

Mr. MCCOY. Do you mean to say that Mr. Finneran is able to buy the same quantity and quality of goods for a less price than you can?

Mr. NIXON. Yes.

Mr. MCCOY. You would hardly call that a rebate, then?

Mr. NIXON. Well, if his output is large enough, and if he buys in 10-gross lots he can get a larger discount because of the future possibilities of his business, because I live in a small town and he lives in a large town.

Mr. MCCOY. If he buys 10 gross he pays one price, and if you buy 10 gross you pay a higher price?

Mr. NIXON. Yes, sir.

Mr. MCCOY. In other words, then, they do not sell at the same price and in the same quantities to everybody?

Mr. NIXON. No.

Mr. MCCOY. And they take into consideration the fact that his business is likely to grow very large and yours is not?

Mr. NIXON. Yes, sir.

Mr. MCCOY. And that is why you want the schedules published?

Mr. NIXON. Yes, sir; it seems to me that is exactly on the same principle as railroad rebates. I do not see why the same principle can not be applied to cover every article that is sold in America. Now, you advertise teas at a certain price, but it does not cut much figure with the public, because there are so many varieties of tea that you do not know what they are really worth. But if you take a well-known article that is sold at a certain price and sell it at a lower price, the public will think that I have been "roasting" them, as the saying is, when getting a fair profit. You will find that goods that retail for $1 are rarely sold for more than $8 or $9 a dozen at wholesale. I was talking with the buyer of one of the largest stores in Worcester a few days ago about shirt waists. They pay from $8 to $9 per dozen for shirt waists, and ladies buy them and pay $1 apiece for them. It is no more than they should pay. The actual cost of doing a retail business, as I said a while ago, is 25 per cent.

Mr. MCCOY. In other words, you claim that these are not exorbitant prices.

Mr. NIXON. Yes, sir; but we are made to appear as charging exorbitant prices. When we sell an article for a dollar and one of the chain drug stores sell it for 49 cents, the public believes that the chain drug store is making a profit when they are selling below cost. I live 18 miles from one of those stores and in 10 years the percentage of my line of proprietary goods has dropped from 45 per cent to 7 per cent.

Mr. MCCOY. It comes down to the question of stealing another man's appetite.

Mr. NIXON. Yes, sir; that is the whole story.

Mr. NELSON. Have you looked into this question of chain stores outside of the drug stores? Do you know whether that is going on in all lines of industry?

Mr. NIXON. I do not know that it is. At the present time it seems to be confined to this particular line of goods. I might say, however, that it goes into other lines in this way: These chain drug stores are practically developing into department stores. They carry large lines of bathroom material and all sorts of things that you would find in an ordinary department store. In very many of those stores you will find the drug department occupying, perhaps, one-tenth of the space and these proprietary goods are simply used as a bait to draw the public there.

Mr. NELSON. If the Government could destroy this chain of stores under the Sherman law, either as operating in restraint of trade or as monopolies, would not that be entering upon price fixing?

Mr. NIXON. Well, that would answer our purpose. We are fighting for existence. We do not care how it is brought about. I represent 40,000 druggists in the United States.

Mr. CAREW. You would not want the Government to fix the prices?

Mr. NIXON. No; but it seems to me that the Government could allow the fixing of prices in the case of patented goods. I do not know why it could not be so. That is all we ask.

Mr. CAREW. You mean patented goods?

Mr. NIXON. Patented, trade-marked, and copyrighted goods. That includes not only medicines but tooth powders and other toilet preparations. The normal price for tooth preparations is from $1.75 to $2 a dozen. It seems to me rather hard to meet the competition of 12 cents a box.

Mr. CAREW. If we were to attempt to fix prices, we might fix them high or fix them low. The question of fixing them low would be a serious question.

Mr. NIXON. We are perfectly willing to leave the supervision of this whole price proposition with a proper commission. I believe a proper commission would be fair. As I said, the actual cost of doing business in a drug store is 25 per cent in the retail business. That is about the average. In the country it is lower and in the cities it is 30 per cent and higher. In the city, drug stores are required to be in good localities, where they must pay high rents. They must have expensive fixtures and they must be well lighted. We have simply got to stop doing business or have some relief in some way. Now, if there are no other questions I will take up no more of your time. I thank you for the hearing you have accorded me.

Mr. STEWART. Some of the gentlemen want to know whether they will have permission to file a written brief with the committee.

Mr. MCCOY. All right; they can do so. The committee is ready to hear from anyone who desires to be heard.

STATEMENT OF MR. J. R. MOOREHEAD, NATIONAL SECRETARY NATIONAL FEDERATION OF RETAIL MERCHANTS, LEXINGTON, MO.

Mr. MOOREHEAD. Mr. Chairman, I understand the hearing yesterday was because we had just arrived in the city. Only a part of our delegation arrived here yesterday, but we appeared before

the committee because the committee said they could hear us then. There are present before the committee now Mr. John A. Green, secretary National Retail Grocery Association, and gentlemen representing the plumbing interests and the coal interests, retailers all.

Mr. McCoy. We will listen to them in any order you suggest.

STATEMENT OF MR. JOHN A. GREEN, SECRETARY NATIONAL RETAIL GROCERS' ASSOCIATION.

Mr. Nelson. Will you give us some idea of the extent of the organization you represent?

Mr. Green. We control possibly 100,000 members throughout the United States engaged in the grocery business, some of them being general merchants, but nearly all of them carrying groceries to some extent.

Mr. Nelson. Does your organization extend to all of the States of the Union?

Mr. Green. All over the country. Well, there are several States which are not affiliated with the national organization, but we have about 40 or 42 States that are connected with that organization.

Mr. Nelson. Do you have an organization in Wisconsin?

Mr. Green. Yes, sir.

Mr. McCoy. Your organization contains members not only from the cities but from country towns?

Mr. Green. Yes, sir; all through the States. The secretary for the State of Wisconsin, Mr. Slattery, is located in Milwaukee. We are here in reference to these bills, and especially this one, which we do not quite understand.

Mr. McCoy. Which one is that?

Mr. Green. This is the one introduced by Mr. Clayton.

Mr. McCoy. Is it a committee print? What is at the top of it?

Mr. Green. No. 2 of the committee print, tentative bill by Mr. Clayton, in regard to the restraint of trade. We feel that we have been refused—when I say refused, I mean by that—take, for instance, the lumbermen's organization which was here yesterday. They have been held in contempt because they attempted to disseminate some information through their secretary.

Now, we think that we ought to have the right to disseminate truthful information to our members if we have some truthful information to disseminate. We do not wish to violate the law. We are not in an organization to raise prices at all, but to educate our members as to the best methods of doing business, and other things of the same kind.

Mr. McCoy. The lumbermen were found against because the purpose of the information, as I understand it, was to get the retail dealers to cease patronizing the wholesale concerns which sold to users and consumers.

Mr. Nixon. I take it for granted that what you say is true, although I do not know very much about it, only that they are held in contempt for circulating this information. I have had a great deal of experience in the grocery business; I have been at it for 20 years, and I have looked into the matter in all its phases. I believe that the present system of distribution in the United States is the best and cheapest method on the face of the globe. Now, I am not

saying that in an offhand way. I have looked into it in other countries and through modern enterprise there is a system come in vogue, from manufacturer to wholesaler, to retailer, and then to consumer. We have been met in the last few years by a growing institution that is reaching out in some way through what I consider fraudulent advertising—I will say untruthful advertising—and they have gotten hold of the business.

Now, if we are doing business in the most economical way, it is not because we have a system that we are agreed upon, but it is because we have a system that has become a necessity through modern evolution of that kind of business. The wholesaler, as you all know, assembles in large quantities goods from all parts of the globe under one roof. The retailer gets his supplies from one place. It would be impossible for me to get my nutmegs from one country and my spices from another country. But the plan is to cut down the expenses so that we can buy our products in the least expensive way. Now, if there have crawled into our business certain methods of other businesses, have we the right to say when we know that a man is selling to us and also selling to our customers at the same price or lower? I think we have the right, when we have information that is detrimental to our business, to disseminate that information. Nearly 90 per cent of the dealers are small dealers, and 10 per cent are the large combination houses or mail-order businesses, as they are known in common parlance.

Mr. VOLSTEAD. What sort of information do you refer to as being detrimental to your business?

Mr. GREEN. Well, if I am buying from you, you should not become a competitor of mine.

Mr. NELSON. You mean if he is a wholesaler?

Mr. GREEN. Yes. You should be a wholesaler; you should stay in your own field. But, further than that, I do not think that you should be allowed to buy a hundred car loads cheaper than I can buy 50 car loads. If that is going to be the case the business of the country is going to be put in the hands of the fellow who has got the money and the small fellow is going to be driven out of business.

Mr. NELSON. What you are talking about now is caused by lack of capital?

Mr. GREEN. Yes, sir; and our inability to defend ourselves.

Mr. MCCOY. In other words, you want to be permitted to give information to the retail grocery store in regard to those wholesalers who are practically competing with retailers?

Mr. GREEN. Well, not particularly so much as manufacturers.

Mr. MCCOY. Well, say manufacturers?

Mr. GREEN. Yes.

Mr. MCCOY. You want to let all in a similar line of business know what the people who make the goods are doing in the selling of them in such manner as to bring about practically a wholesale competition with the retailer. Is that the information you want to give?

Mr. GREEN. I want to give out information that I am being discriminated against in regard to prices. That is, that somebody will sell to somebody else at a less price than he will sell to me.

Mr. MCCOY. That everybody knows.

Mr. GREEN. Yes; but I am not allowed to say anything about it to our members. Take the case of the northwestern lumbermen who

were before the committee yesterday. They were tied up because they disseminated information through their secretary.

Mr. McCoy. I think you are mistaken about the sort of thing they were brought into court for. I do not imagine that any complaint was made that any lumbermen were selling in car-load lots at a lower price than that at which they were selling 50-car-load lots. That everybody knows was done. I know about the lumber case. In fact, I know the secretary of the organization. But what they complained of in that case was that information was being given out to retailers that the big producers of lumber were selling to the men who actually put the lumber into the buildings.

Mr. Green. Yes.

Mr. McCoy. Instead of selling to these men who used it.

Mr. Green. Yes, sir.

Mr. McCoy. They gave out that information?

Mr. Green. Yes, sir.

Mr. McCoy. And you want to give out similar information to that which was given out to the retail lumber dealers?

Mr. Green. Yes, sir.

Mr. Nelson. What you want to get at, in effect, no matter how it is done, is to protect yourself from the wholesaler or manufacturer selling direct to the consumer in your territory?

Mr. Green. Not particularly in our territory.

Mr. Nelson. Well, we are speaking frankly about these matters. You believe it unfair that you should compete with a manufacturer of whom you buy your goods?

Mr. Green. Yes, sir.

Mr. Nelson. Now, I am looking at it along a larger line. Here is the producer on the one hand and the consumer on the other.

Mr. Green. Yes.

Mr. Nelson. Now, there is danger when we work that out. The manufacturer will take his share, the wholesaler his share, and the retailer his share of profit, and that will enhance the cost of living to the consumer to such an extent that he suffers by it. How are you going to protect the consumer when each organization is able to load down the cost because of its power?

Mr. Green. That is not our idea. That is the very farthest from our minds.

Mr. Nelson. But how is the consumer going to come out in this matter?

Mr. Green. That is one of the greatest questions before the American public to-day; that is, the right of the manufacturer to name the price at which his product shall reach the consumer.

Mr. Nelson. You are in favor of that?

Mr. Green. I am, on staple commodities. That question is receiving more consideration at the present time than any other one thing. What we want—and I speak specifically for our own trade—is a fair remuneration for the services which we render the public. My experience and my observation has taught me, both in other countries and in this country, that the minute that we do not render that service, when there is any cheaper means of getting that stuff to the consuming public, we will not be here to enter a protest.

Mr. Nelson. In other words, you do not complain against fair competition, but against pretending competition or unfair competition?

Mr. GREEN. Well, both pretended and unfair competion. This bill will practically prohibit our telling our members of conditions that might exist in the trade detrimental to our welfare.

Mr. McCOY. What words are there in the bill that cover that point?

Mr. GREEN. The words "every contract," "combination in the form of trust or otherwise," "conspiracy in restraint of trade or commerce," and the word "monopolize." Now, we do not monopolize, but this provision will apply to our association. It is on the first page of the bill; that is, the first two or three words there—the third, fourth, and fifth lines.

Mr. McCOY. This particular bill, if it should become a law, would not put you in any worse situation than you are now in under the Sherman law.

Mr. GREEN. Yes; but we are trying to better that situation. We thought that by coming here and talking this thing over there might be some relief.

Mr. McCOY. In other words, you hoped that we might so amend the Sherman law as to give you some relief?

Mr. GREEN. Yes, sir. Now, I have had introduced in several State legislatures throughout the country a measure prohibiting untruthful advertising, and I hope the day will come when we will have it here. I saw recently in a catalogue an advertisement for a stove. In the advertisement it weighed so much, but in the store it weighed a great deal less. You could not tell the difference except by going in the store and feeling the stove. I saw an advertisement in a paper recently for a sash for a greenhouse, and the price was $1.20. That was the statement made in the paper. The merchant was asking $3.50 for it. Now, it was advertised for $1.20 in that very paper, but he was asking $3.50 for it. Now, if we can have the privilege of informing our members as to what is the truth of these matters, the minute we begin to disseminate any information of that kind we will be fined, just the same as the Southern Wholesale Groceries.

Mr. McCOY. I think you are entirely mistaken in assuming that any law, the Sherman law or any other law, would prevent your stating, at the risk of being indicted for criminal libel, perhaps, that a certain man was advertising to sell one thing whereas he was selling another. There is nothing in the Sherman law as to that. As you have the lumber case in mind, I am quite clear that the one thing that you are complaining about that is now forbidden by law is the notification to the retail dealers of the names of those who pass over their heads and sell to the consumers. Now, if you make a statement about it you take the risk of having some man indict you for criminal libel, or having a civil suit for libel. But aside from that risk you take no risk under the Sherman law if you say that John Jones advertises a stove to weigh 50 pounds when, as as matter of fact, it weighs 25 pounds. As a matter of fact, all the dealers of the country could get together and make that statement, and if you told the truth no law could reach you, provided you did it in good faith.

Mr. GREEN. Is it a fact that we can assemble and discuss just such questions as we are talking about now?

Mr. McCoy. Well, if I were your attorney I would advise you that you could do that with perfect impunity so far as the Sherman law is concerned.

Mr. Green. Suppose the Department of Justice comes into your office every three or four weeks or even three or four times a year and wants to look through. Some time ago a gentleman came in and gave me his card and went through our office and looked all over. We were very glad to have him, of course.

Mr. McCoy. What was he looking for?

Mr. Green. He was looking to see whether we had anything in restraint of trade. He looked at our books and papers and we were very glad to show them to him.

Mr. McCoy. What do you think he suspected?

Mr. Green. I do not know.

Mr. McCoy. How did he happen to come to your store?

Mr. Green. Oh, he did not come to our store; he came to the office of the association.

Mr. McCoy. Oh, I thought he came to your store.

Mr. Green. No; he came there twice in the past year. He came to the office and not to the store. I have nothing to fear from anybody. I opened up our books to him and was glad to do it.

Mr. Nelson. You represent the grocerymen?

Mr. Green. Yes, sir.

Mr. Nelson. Do you know of any locality where the local grocerymen get together and fix prices, or agree upon prices?

Mr. Green. I do not believe there is a place in the United States where they do that.

Mr. Nelson. Now, outside of that, what could the Department of Justice be looking into your affairs for?

Mr. Green. Well, I do not know. We have always been given to understand, in fact, I was told by an attorney, that they had no right to take up the question of the expenses of our business. However, I like to show a man the cost of my business.

Mr. Nelson. Would not that come back to the question of prices?

Mr. Green. No; that is not the question of prices. It is a question of conducting your business to get the most out of it. A man should understand his business. For instance, he may go along and he will say, "I am buying this stuff for 20 cents and I will sell it at 21 cents and I will make a penny." Now, is it restraint of trade if I say, "Here is what I do in my store," and show my expense account?

It is true enough, goodness knows, all over the United States, that unless a man advertises it is impossible to build up his business.

Mr. Nelson. What leads you to think this comes under the prohibition of the Sherman law?

Mr. Green. We have been given to understand that, and by pretty good lawyers.

Mr. Nelson. But that is neither in restraint of trade nor a monopoly.

Mr. Green. That is all we are in business for; that is all our association stands for, to educate our people as to the best methods of doing business, and to try and secure such legislation as is considered of benefit. We believe it is to our benefit to advertise.

Now, you take bill No. 2, which provides that no person——

Mr. VOLSTEAD (interposing). I think you mean the first section of No. 1.

Mr. NELSON. Yes; that is what you want, I think.

Mr. GREEN. Yes; I will read it:

That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller.

That means that somebody else shall buy cheaper than I can buy.

Mr. VOLSTEAD. How do you figure that would operate? Do you think that would be of any value to the grocers?

Mr. GREEN. I do not quite understand your question.

Mr. VOLSTEAD. Do you believe that section would be of any value to you?

Mr. GREEN. No; I do not think it is. The fact that big combinations can buy cheaper than I can buy is a thing that should not exist, I think.

Mr. VOLSTEAD. Do you think this measure would tend to prohibit that?

Mr. GREEN. No.

Mr. NELSON. You are in favor of the section, however, that prevents discrimination in prices?

Mr. GREEN. Yes; we are in favor of that.

Mr. NELSON. You are in favor of that proposition?

Mr. GREEN. Yes, sir; we are against discrimination in prices. I do not know how much this is going to cover. Now, as I said before, we have certain lines of business——

Mr. NELSON (interposing). That would do this, would it not? If you are handling or if you are selling some article, a combination that sells that article in one place at one price would not be able to come into your locality and sell it at a cutthroat price, and if that is so, would not that protect you?

Mr. GREEN. Yes, sir.

Mr. NELSON. That is what this is intended to accomplish.

Mr. VOLSTEAD. Let me ask you whether this section would accomplish anything of that kind?

Mr. CARLIN. Yes; that is intended to cover that particular case.

Mr. VOLSTEAD. I do not believe it would be very effective. How would you be able to prove that it was "with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller?"

Mr. CARLIN. You could do that in the same way you could prove anything else. Take the Standard Oil case. Everybody knows what the effect of that was.

Mr. VOLSTEAD. I know, but here is a grocer, and he buys from one of those concerns. How is he going to be able to prove that he sold at a lower price for the purpose of injuring somebody else?

Mr. GREEN. I do not know how you are going to prove that.

Mr. VOLSTEAD. How are you ever going to be able to prove that it is done for the purpose of injuring or destroying a competitor?

Mr. CARLIN. As I said, you could prove that in the same way that you could prove anything else.

Mr. GREEN. There is another thing I would like to discover, and that is whether the wholesaler is selling to the consumer. I ought to know that. He either wants to sell to me or to the consumer, but he ought not to sell to me and then be a competitor of mine, and I want the privilege of discovering that information.

Mr. NELSON. Would you object to his selling only to consumers?

Mr. GREEN. That is a different thing. We can not do anything with a man of that kind.

Mr. NELSON. You would not object to that?

Mr. GREEN. I do not know. You mean a man——

Mr. NELSON (interposing). A manufacturer selling directly to consumers.

Mr. GREEN. Well, I do not know why he should.

Mr. NELSON. I just wanted to get your views on that situation.

Mr. GREEN. Well, if a manufacturer wants to sell to the customer or to distribute his product throughout the country I do not know how we are going to stop him; but at the same time I do not know why it should be done, because we have an economical distribution now and the most economical, I think, that can be devised. However, if some one person undertakes to do his business in some other way, we can not stop him, as far as I know. But I am not in favor of it, by any means.

Mr. MCCOY. When Mr. Low appeared before the committee yesterday he spoke very strongly in favor of cooperative stores; that is, stores, as you know, organized by consumers. What is your view about such stores?

Mr. CAREW. Dealing directly with the wholesalers.

Mr. GREEN. They are a failure, and I will tell you why, if you will permit me to do so.

Mr. MCCOY. I did not mean to go into the question whether or not they are failures, but would you prevent their coming into existence?

Mr. GREEN. I do not know why they should come into existence.

Mr. MCCOY. He said they were an enthusiastic success.

Mr. GREEN. Well, I think he must be mistaken about that.

Mr. NELSON. You have a right to differ from Mr. Low, and we want your views.

Mr. GREEN. Let me talk to you for two or three minutes about this thing.

Mr. MCCOY. Regardless of whether they are a success or a failure, would you undertake to prohibit their existence?

Mr. GREEN. Well, I do not know; I do not know whether I would or not; that is, I do not know whether I would attempt to stop the beginning of them, because time tells when they are down and out. They can not succeed in this country. They will never succeed, and I will tell you why in two or three minutes. I was in England four years ago. I have been to England since, and I am going again. I went there on purpose to study trade conditions, and, in addition, of course, I went for a good time. But when I was in England a motion was made in a cooperative society in the city of Jarrow, which is in the north of England, a few miles from the city of Newcastle. You have often heard the saying, "Carrying coals to New-

castle." The city of Jarrow is near Newcastle. A lady got up and moved that the minimum wage of a girl from 12 to 14 years of age be 5 shillings a week. A gentleman got up and supported the motion, and he said that he had to admit one thing, and he was ashamed to do it, that girls 18 and 19 years of age—young women—were willing to begin at the minimum wage of 5 shillings a week, $1.25. Now, that could not go into effect without going into the general board. The general board took it up and discussed it, but the board turned it down because of the fear that it would interfere with dividends that they had to pay. A condition of that kind can not exist in America.

Mr. McCoy. Conditions pretty nearly as bad do exist, but that is aside from the question I asked. I could take you into places in New York where girls, lots of them, and families, do not earn more than $1.75.

Mr. Green. Let us as American citizens blush with shame that such a thing exists.

Mr. McCoy. That condition ought never to be, but it does not affect the question whether or not you should put a stop to these things.

Mr. Green. I wish some plan could be devised whereby we could stop that thing.

Mr. Carlin. Look at section 10 and tell us whether your association approves of that section or not.

Mr. Green. I will read it:

That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to make a sale of goods, wares, or merchandise or fix a price charged therefor or discount from or rebate upon such price on the condition or understanding that the purchaser thereof shall not deal in the goods, wares, or merchandise of a competitor or competitors of the seller.

Mr. Carlin. You understand that, do you?

Mr. Green. In case there was a cooperative store started that I should not object to their getting goods?

Mr. Carlin. Oh, no. The point is that a manufacturer shall not sell you his goods and require you to contract with him to sell his goods exclusively. This provision would give you the right to sell his competitors' goods or anybody's goods you pleased.

Mr. Green. Well, personally, I would not want any manufacturer to stop me from buying goods from any manufacturer.

Mr. Carlin. Then you think that is a good provision?

Mr. Green. Yes; I do not think there is anything wrong about it in any particular. Now, if you have no questions, I will give way to the gentleman who wants to be heard.

Mr. Volstead. If you want to give any further explanation as to why cooperative stores could not exist in this country, I would like very much to hear it.

Mr. Green. Will you allow this gentleman to speak who wants to catch a train? And then I will resume my statement.

Mr. Moorehead. I would like to introduce to the committee Mr. Trainor, of Baltimore, Md.

STATEMENT OF MR. JOHN TRAINOR, OF BALTIMORE, MD.

Mr. TRAINOR. My name is John Trainor, of Baltimore, Md., and I am engaged in the steam heating and plumbing business, steam and hot-water heating. I in part represent the National Association of Master Plumbers on this occasion.

Mr. NELSON. Officially, what is your position in the plumbers' association?

Mr. TRAINOR. I am just a member at present. I was formerly national president. I am engaged in private practice, but under our rules a man who has occupied the position of president is a member while he lives, pending good behavior. So that is the only position I have at present.

Mr. Chairman and gentlemen, I was handicapped a little bit by not hearing what was going on. I did not hear the questions and I did not hear the answers very well. It was because of my hearing. I am not deaf, but I am a little bit hard of hearing to-day. So I do not know the nature of the questions that have been propounded.

However, we feel that this bill is intended to be a sort of interpretation of the Sherman Act as it applies to trade. There is something in regard to the present Sherman Act and its interpretation by the Department of Justice that troubles us very greatly. We have been cited to come before the department, and after making our objects and purposes known they seemed to be entirely satisfactory to the department.

Mr. MCCOY. Have you a written constitution and by-laws?

Mr. TRAINOR. Yes, sir.

Mr. MCCOY. Can you file those with the committee?

Mr. TRAINOR. Yes, sir; we would be very glad to do so. However, we have not them with us this morning.

Mr. MCCOY. Well, send them to the committee. I would like to ask Mr. Green to do that also.

Mr. GREEN. I will be glad to do so.

Mr. TRAINOR. Here is one of our troubles: Certain manufacturers and mail-order houses—I will not say conspire—make a business arrangement amongst themselves that they will distribute their goods through certain channels, the mail-order house taking a certain percentage of the manufactured article, with the understanding that the balance of the goods turned out by that concern shall be sold at a certain price to us as contractors and retailers

Mr. CARLIN. Do they not go further and fix the price at which they shall be sold?

Mr. TRAINOR. They try to tell us about that, but we do not fix the price. We will not tolerate that. We have been in existence for a great many years and we have never tolerated the question of fixing prices. We believe that competition should exist amongst men legitimately engaged in business. If somebody else has less overhead charges and can afford to sell goods at a lower price to the consumers than others can sell, we believe that he ought to have the right to do so. We object to manufacturers combining with mail-order houses in order to make a distributing agency. We believe in having open competition, and that if a man bids lower than his competitors he should secure the business.

Mr. McCoy. Let me ask you this question: Does each manufacturer, say, of bathtubs, pick out a different man in Baltimore, or do they all pick out the same man?

Mr. Trainor. Oh, no; he might not pick out any of them, and some of them sell on a fair basis.

Mr. McCoy. Are there several manufacturers of a given article who get together and pick out one man in Baltimore, or do they get together and say, "I will pick out one man," another says, "I will pick out another," and the third says, "I will pick out a third." In other words, is there a combination among the manufacturers on the one hand and among the big dealers on the other, or does each manufacturer pick out an individual?

Mr. Trainor. I think that each manufacturer that picks out anybody picks out an individual on his own account, or some manufacturer arranges with a mail-order house and the mail-order house will get certain discounts.

Mr. McCoy. Then, who picks out the man in Baltimore that he wants to handle the goods?

Mr. Trainor. The manufacturer.

Mr. McCoy. Then why does he go to a mail-order house, say, in Chicago, to pick out a plumber in Baltimore to handle his goods?

M. Trainor. He picks out the mail-order house to sell a certain percentage of the goods. He will probably pick out one small town at a time, or a large town, and sell goods at low prices, which will destroy competition.

Mr. MCoy. Is the man who picks out the man in Baltimore who has the exclusive handling of the goods the man who makes the goods?

Mr. Trainor. It is the man who makes the goods, and he sells the balance of his goods that the mail-order house can not take.

Mr. McCoy. But the mail-order house does not pick out the contractor?

Mr. Trainor. No, sir; he only makes the arrangements that he will do certain things and then when he has competition destroyed he can fix the prices to suit himself. There must be some goods delivered in every town or city for stock and convenience, and neither the manufacturer nor the mail-order man is willing to do that, because that would entail expense; he wants the small dealer to do it.

Mr. Carlin. In return for that he gets a contract from this particular man that he will not handle anybody else's goods?

Mr. Trainor. Yes, sir.

Mr. McCoy. Do you not think that section 10 of our bill would prevent that? You see, under that section if he does the thing complained of and it is proven, it would be a violation of the law. That is, if we succeed in getting this bill enacted.

Mr. Trainor. Well, I believe, if it is proven, we have a remedy that can be legally applied. We respect our Government and our laws as much as any men in the world. We would feel disgraced if the Department of Justice ever brought suit against us and brought us to trial, even though we were exonerated. If, in addition to that No. 10, we were allowed to make the facts known in the case, the plain honest facts, just to publish them and circulate them without recommendation or remedy, I believe that trade matters could be better

adjusted. Personally, I would not deal with any manufacturer in the world who would sell me goods and stock and then go out in the market and sell against me and my customers probably as low or lower than the price at which I buy my goods from him and destroy my business. The first duty of the Government is to protect its own people. There is such a large number of people in the retail business that no aggregate of trade or money should be permitted to destroy them.

Mr. CARLIN. On the other hand, you feel that you should have the right to buy goods from whomever you please?

Mr. TRAINOR. Yes, sir.

Mr. CARLIN. Under this section, do you not think that your whole case would be met if we gave you permission to make public the prices charged?

Mr. TRAINOR. I was one of the committee that was cited before the Department of Justice about five years ago, and our offense, or what they thought was an offense, was to publish in our bulletin the names of the manufacturers and wholesalers in plumbing and heating supplies, simply with a heading, for the information of our members.

Mr. CARLIN. Does your association deal with the Sanitary Manufacturing Co.?

Mr. TRAINOR. Yes, sir; that is, where the Sanitary Manufacturing Co. will do business with us, because in some towns they will not do business with us at all. They have some kind of an arrangement whereby they sell to jobbers, and in those towns we have to go to the jobber that handles their goods. But we were told that this brown book that we published, while it was not a black list, it looked like a white list. Now, we simply wanted to keep our members informed as to who was dealing in goods and wares in a wholesale way. I do not purchase there, and the reason I will not purchase there is that I would be foolish to help a competitor to further crush me out of business by giving him a profit on the job on which he was competing with me. Indeed, I could not live at all if the manufacturers were to deliver goods in every building in which I was working. The end of it all would probably be that I would be one of their distributing agents working in their office.

Mr. CARLIN. You think he ought to have a right to select his customers?

Mr. TRAINOR. Yes, sir.

Mr. CARLIN. Then you approve of section 9?

Mr. TRAINOR. Yes, sir. We want to get some interpretation of it whereby we know what is legal for us to do.

Mr. CAREW. As I understand it, the thing you want to do is to publish the truth?

Mr. TRAINOR. Yes, sir; the unvarnished truth, and we will be glad if the Government investigates it at any time it thinks proper.

Mr. CAREW. And the truth in your case consists of a list of names Now, what do your members understand by that? What is understood by that list?

Mr. TRAINOR. They understand that those are the concerns that are engaged in manufacturing and wholesale dealing in our supplies; nothing else.

Mr. CAREW. And the fact that a man's name is omitted from that list is information to your members that he is a wholesaler who is also a retailer?

Mr. TRAINOR. Well, that could be implied very nicely. Of course it could.

Mr. CAREW. We all know that a wink is as good as a nod to a blind horse.

Mr. TRAINOR. Yes, sir; perfectly true.

Mr. CARLIN. In other words, the effect of that is to boycott the fellow whose name does not appear in your publication?

Mr. TRAINOR. Not at all.

Mr. CAREW. I do not want you to be afraid of that word "boycott."

Mr. TRAINOR. Well, I do not like the use of the word. I believe it was originally applied by the labor organizations, and I think it is a very obnoxious word.

Mr. NELSON. They are perfectly frank in admitting what it is. They call it a boycott.

Mr. TRAINOR. That is right. We want to give out the information to our members that they need not deal with our competitors unless they wish to.

Mr. NELSON. Now, the real truth is that you want to be able to tell the world, without being in violation of the Sherman antitrust law, that certain gentlemen are not only selling wholesale but are selling retail?

Mr. TRAINOR. And are consequently competitors of ours.

Mr. NELSON. And the retailers will understand that and will then withdraw their patronage?

Mr. TRAINOR. Well, that might be the final result. In the last analysis it might be so. The Department of Justice said to us that it looked like we meant it for a white list instead of a black list, and they advised us not to publish it, and we stopped it immediately.

Mr. NELSON. Well, I am not excusing anybody, but I want to get at this point: How far can we protect farmers, laboring men, and merchants against the operation of the Sherman law where they simply wish to control their own patronage?

Mr. TRAINOR. Well, I do not know.

Mr. NELSON. You justify this right to publish a white list on the ground that you have a perfect right to control your patronage?

Mr. TRAINOR. The principles of self-preservation dictate that. We are willing to say that if any manufacturer will come into our town and open a business and pay his own expenses there, that is not so bad. We raised that point with the Department of Justice that our competitors in the wholesale business who were also selling at retail did not pay any license and contributed nothing toward the support of the State, and hence it was unfair competition. If they will be subject to the expenses that we are subject to, we do not care how they sell their goods, or at what price.

Mr. NELSON. Where does the consumer come out in all this?

Mr. TRAINOR. We would be delighted if the commission would investigate the subject for the reason that we think the consumer would be far better served.

Mr. NELSON. But how?

Mr. TRAINOR. The consumer would have the advantage of a local man experienced in the selling of goods.

Mr. NELSON. But might not that man put the goods up so high as to be excessively high to the consumer?

Mr. TRAINOR. There are 600 men in the business in the city of Baltimore, and with such an enormous number of men in this business there could not be any fixing of prices.

Mr. MORGAN. In other words, the number of people would insure competition?

Mr. TRAINOR. Yes, sir. And then, again, the consumer is dealing with some one who is expert in his line. They recommend an article that is suitable for the purpose and they install it at as low a price as they can and live, because if they raise the price their neighbors will get the business. If the goods are sold by the mail-order house or by combination stores or by distributing stations, there is no one to look after the business, and the consequence is the business would probably be destroyed or they could not give good service. The effect of all of the business arrangements that have been made with us has been to raise the price, because when the competition is destroyed, as in the case where the manufacturer will not sell to us at all, he picks out a manufacturer in one city to handle his goods—for instance, the Sanitary Manufacturing Co.

In large cities there may be two or three agents of it. You have to go to the jobber and buy those goods. You can not buy them from the manufacturer. We believe that in that case where we have to pay for construction and it requires skill and experience and scientific knowledge, such as it does to fit up a modern building for office purposes or governmental purposes——

Mr. NELSON (interposing). Let me ask you this question: You are are a plumber?

Mr. TRAINOR. Yes, sir.

Mr. NELSON. Do you have to buy of a plumbers' trust?

Mr. TRAINOR. I do not think so. I think the Bathtub Trust was intended to be a trust fixing the price of every enameled article. We had to buy from them and pay their prices while they existed.

Mr. NELSON. So your competitor now is the mail-order house?

Mr. TRAINOR. Yes, sir. The mail-order house is our worst competitor. They bring discredit upon the business such as I am in. They will send their catalogues to people who do not know how to pick out fixtures, and when they are delivered on the ground we can not put them in. The mail-order house will not take them back and the unfortunate person who bought them tries to make an arrangement to use them somewhere else. There are valves in these automatic flush tanks intended for high pressure, and they are sent to small suburban towns where the water pressure is 10 or 15 or 20 pounds and they will not operate at all, and the consumer suffers from that.

Mr. CARLIN. In effect, any person whose name does not appear in your publication is debarred from doing business with your association. Is not that true? Have not your members agreed among themselves not to buy of anyone whose name did not appear in your publication?

Mr. TRAINOR. Absolutely not, and I do not believe that 20 per cent of our members have seen the publication. There has not been any publication for about five years. We at once stopped the publication of the so-called "brown book."

Mr. CAREW. Did you ever try to do it by word of mouth?

Mr. TRAINOR. If you mean if anybody asked me who was the wholesale dealer in my town, I told him. I would tell anybody if anybody asked me to-day.

Mr. NELSON. You would tell them the truth, too; you would not give them the name of anybody selling to your customers?

Mr. TRAINOR. Well, I have not had any trouble with anybody selling to my customers. No manufacturers ever sent any goods to my building for my customers, because I knew I could not pay my expenses and educate my family unless I could install plumbing in the right way; that is, unless I furnished the materials myself, or had some interest in the operation that was going on. Of course I have some responsibility, because if I break one of the fixtures I have to restore it.

Mr. MCCOY. What do you think of the publication in the Federationist, the paper of the American Federation of Labor, of the "We don't patronize" list, which they were forbidden to publish in the Buck's Stove & Range case?

Mr. TRAINOR. Well, I would answer that by stating that it reminds me of a story I once heard about a farmer who used a big farm for pasture, and one day when he was out plowing on his farm the steer bull who was the superintendent of the cattle on the farm was wandering around. The railroad had come through there recently. As the train came in the bull raised his head and ran out on the track, lowering his horns. Afterwards there were some grease spots found along the track. The old farmer touched his horses and said, "Get up"; then, looking at the grease spot, he said, "I admire your spunk, but I question your judgment." So I admire the spunk of the gentlemen, but I do not see how else they could protect their interests.

Mr. MCCOY. But they are not publishing it now. There is not anything different in essence between the kind of list that you want to publish and the "We don't patronize" list of the Federationist.

Mr. TRAINOR. Well, I do not know what the relative merits are. We simply want to publish the facts without any special inducement to anybody to circulate them.

Mr. MCCOY. Well, would you approve of the circulation of that list by the labor unions?

Mr. TRAINOR. Well, I think not, in the face of the interpretation of the law.

Mr. MCCOY. I am not asking you the legal proposition, but assume that the Buck Stove & Range case had never been in the courts at all. What would stop you publishing your list would stop them, too, would it not?

Mr. TRAINOR. Yes, sir; it stopped them before it stopped us.

Mr. MCCOY. Now, would you care to see the law amended so as to give your organization the right to publish your list and also to give the labor organization the right to publish their list?

Mr. TRAINOR. I would like to see the law framed, if it would not be disastrous to the interests of any people of this country, so as to enable any business like mine, plumbers and heating association men,

to protect their interests so that they might succeed. For instance, the selling of a wagon, advertising it to be a certain thing, when it is not a certain thing at all——

Mr. McCoy (interposing). Well, you are getting away from the point. You claim that you want to have and you ought to have the right to publish a list of names of manufacturers from whom goods can be bought wholesale.

Mr. Trainor. Yes, sir.

Mr. McCoy. Now, you have admitted that by implication——

Mr. Trainor (interposing). No; pardon me, Mr. McCoy. I said from manufacturers who retail their goods.

Mr. McCoy. Very well. You want to publish the list of manufacturers who retail their goods?

Mr. Trainor. Yes.

Mr. McCoy. And from that you want your members to infer that they had, in their own interest, better not buy from anybody else. Now, that is exactly what the labor organization wanted to do in advertising their "We don't patronize" list. They claimed that the firms and corporations named under that heading had treated labor unfairly, and that. therefore, labor, in its own interest and for its own protection, should not buy the goods produced by those people. Now, is there anything essentially different between the two plans, so that you could approve of your plan and disapprove of their plan?

Mr. Trainor. Yes, sir. The difference is that we make no attempt, and never did, to fix prices, and that is their main object. They have nothing to sell but their labor, and they are trying to actually fix the prices in dollars and cents. We would be perfectly willing to be dissolved the moment we attempted to fix the prices.

Mr. McCoy. Now, on that "We don't patronize" list are the names of many with whom the labor organization quarreled, not because of wages but on account of conditions being insanitary or dangerous or otherwise bad in the places of employment. Would you be willing to see them in a position where they could publish a list of persons who did not have proper sanitary conditions in their factories?

Mr. Trainor. Well, I know so little about labor organizations that I do not know what they would like to have.

Mr. McCoy. Well, I am assuming that they list manufacturers who do not provide safe quarters or safe machinery. Now, would you give them the right to publish a list of such manufacturers?

Mr. Trainor. I certainly would, if that is what they want to accomplish—to have proper housing and proper treatment for the workmen.

Mr. McCoy. Then, the only way in which you would restrict them would be in publishing a list of names of those whom they did not patronize because those persons did not pay high enough wages?

Mr. Trainor. Judge, I would not restrict them at all, because I do not know what other way the men would have of getting their just reward. It might be absolutely necessary for them to do that, but I am not prepared to assume that.

Mr. McCoy. But assume, for the sake of argument, that it is necessary for the labor men to publish a list of that kind in order to get proper wages, would you approve of that list?

Mr. TRAINOR. I would approve of it is it was necessary for them to maintain themselves in a proper way as American citizens.

Mr. BARRY. I might suggest that a parallel case may be found in the publications of Dun and Bradstreet. I think that is a parallel case. We want to operate under the same law as the credit associations operate under.

Mr. MCCOY. And then those have an entirely different reason, because the man who sells the goods to him would be likely to lose his money?

Mr. BARRY. Sure; that is a parallel case. All we want to do is to operate under the same, identical law that the credit associations operate under. We can not conduct these credit associations as retail merchants, and we get around it by organizing an association. Our association does for us exactly what Dun and Bradstreet do for their customers.

Mr. MCCOY. I am not taking the stand that you ought not to have the right, but I was simply trying to develop your idea.

Mr. BARRY. We do not have any "we do not patronize" agreement. Dun and Bradstreet with their customers have no agreement. They may tell you a man is not worth a dollar, and I have the right to tell you a man is not worth a dollar. Our association tells a member that such and such a man does so and so. I have no agreement, implied or otherwise, to buy or not to buy.

Mr. MCCOY. I did not say that you have not a right to do that or that you ought not to have it, but would you extend the same right to the labor organizations?

Mr. BARRY. Certainly.

Mr. MCCOY. To the extent of that "We do not patronize" list?

Mr. BARRY. There is an agreement——

Mr. MCCOY. There is no agreement whatever. They have the different labor organizations throughout the country, and they do not get together and agree that they will not patronize these various people against whom there are complaints, but they just publish that list. Sometimes they will discipline a man in a labor organization if he does patronize, but in a great many cases they do not attempt to enforce any such discipline at all, but they leave it to the laboring man to buy or not to buy, but they give him the information, and they claim they have the right to do it. In other words, they claim they have a right to boycott. The word "boycott" has a perfectly well-understood meaning in the language to-day and we might as well use it. You are claiming the right to boycott the manufacturer who is also a retailer. They claim the right to boycott the manufacturer who does not treat them as they think they ought to be treated. Is there any essential difference, and ought a law to be so framed as to permit the one and restrain the other?

Mr. TRAINOR. The only difference I see is this, that out of a membership extending all over the country, fluctuating from 10,000 to 15,000, we have never disciplined anybody for buying. We furnish this information and we have no by-laws to do it.

Mr. MCCOY. That is entirely aside from the point. They do not discipline everybody. They may discipline some, but they do not claim the right to discipline everybody.

Mr. TRAINOR. They have a tendency——

Mr. McCoy. Then, I will eliminate that. Suppose a labor organization does not claim the right and does not exercise any power of discipline over its members. Just leave all that out. Suppose their by-laws provided that no man should be disciplined because he bought from an unfair manufacturer or bought goods from any unfair manufacturer, ought the labor organization to have the right to publish "We do not patronize" lists?

Mr. Trainor. Unquestionably. As you say, they were not eliminating any unfair penalties. If the penalties are removed, there can not be very much discipline, and unquestionably for their own preservation they ought to have that right. They might as well disband if they do not have the right to inform.

Mr. Nelson. Theirs goes to wages and yours goes to price.

Mr. Trainor. Ours does not go to price.

Mr. Nelson. Does it not? Are not your agreements that if this wholesaler sells at a less price or sells at the same price to your consumer that you pay him as a buyer, you are objecting to that difference in price?

Mr. Carew. It goes to the defense of your own interests anyway.

Mr. Trainor. We are objecting to that difference; there is one point. If the wholesaler would compete for the small business and the large business, he would be on a footing with us, but when he only comes in and takes big business and combines to take big business, such as supplies for this House Office Building and other large buildings, and lets us work out our salvation on small buildings, he makes it impossible for us to make a living at all. In the case of the laboring men, they get some compensation. We would not get enough to exist at all. They are trying to better their condition, and when they do it within bounds I think they ought to have the right to do so.

Mr. McCoy. You have some business left?

Mr. Trainor. Yes; in some cases.

Mr. McCoy. Then you are on a parity with the laboring man. You have some business left and he has some opportunity to work for starvation wages. You are complaining of starvation in your business and he is complaining of starvation for himself and family.

Mr. Trainor. That is right; in that respect we are on a parallel.

Mr. Carew. You are willing to go in the boat with them?

Mr. Trainor. Surely; we want every man to have his rights, and there should not be any iron-clad arrangement. It ought to be free competition, absolutely fair and free.

Mr. Carew. Plenty of publicity?

Mr. Trainor. And I have been 38 years engaged actively in it, and I would agree to let this left-hand be cut off before I would go into combination to increase the price on the consumer. That is the sentiment that prevails in our organization. There is not a man now living, or who ever did live, who can come forward to say that we ever tolerated the fixing of prices. We want competition to be free and open, and the man who has capacity for business, who has surrounded himself with good organization in the way of competent men, efficient help and machinery, and applies himself closely to it, we want him to sell his goods at any price he can sell them so he can make a living.

Mr. CARLIN. The association that just preceded you wanted the prices fixed in such cases. You do not approve of price fixing?

Mr. TRAINOR. I would not believe in any price fixing, unless in the case where there was discrimination. If there was discrimination, and if there was discrimination that had for its purpose the wiping out of certain enterprises, such as small retailers, I say that in a case if it could be proven that there was discrimination in the price to an extent that would make it impossible for them to live, and big business was buying at a different price—so much so that they could not exist at all—then I think the Government should step in and regulate that condition.

Mr. NELSON. Right there, if the Government fixes a price large enough for the little man to live, might that not be an extraordinary price for the big concern which had resources and opportunities that the little man did not have?

Mr. TRAINOR. We do not want the Government to fix a price at all. You misunderstand me. We want them to stop discriminating We do not say that the Government should regulate the cost, at 90 cents; but we think they should say if the manufacturer is selling at 80 cents to one distributor he should be compelled to sell it under the same conditions to other people at about the same price, varying a little for large orders and very large orders.

Mr. CARLIN. And for railroad transportation?

Mr. TRAINOR. Surely; and spot cash, and all that.

Mr. MCCOY. Would you have discrimination made for cash sales beyond the mere rate of interest and the deferred payments?

Mr. TRAINOR. Yes; there ought to be a distinction for cash as well.

Mr. MCCOY. I mean beyond the mere discount at 6 per cent?

Mr. TRAINOR. No; because were that allowed I fear money could so easily be assembled and tied up in one place that the captains of finance would get a hold and buy it all up.

Mr. MCCOY. I understood you to say you would make a discrimination in favor of the man who pays cash?

Mr. TRAINOR. I say that it would hardly be fair to tell a manufacturer on that point that he should refuse to sell his goods at a small discount, if he got spot cash.

Mr. MCCOY. Would you make the discount any larger than the rate of interest at 6 per cent on the anticipated payment?

Mr. TRAINOR. I do not think I would. It ought not to be so much that the man who bought it at the standard price, at the trade price, could not live in competition with it, and it should still be made possible for him to live.

Mr. MCCOY. I just want to ask one more question, and that is that your association will notify all its members that the committee in Congress has a very hard job, because some people are asking for one thing, other people are here saying they do not believe in it, and we have people pulling this way and that and the other way; and I want to ask you whether you see any escape from socialism?

Mr. TRAINOR. Well, I hope there is some escape, but there are signs there is going to be difficulty with it. At the same time, I would say to you, in answer to the reasoning you indulged in just now, that we marvel that you can give so much time to us when there are so many interests to be heard that we really feel as though it

would almost turn a man's head to listen to it, because it is a very much out of harmony.

Mr. McCoy. We would very much rather listen to you than to solve your problems.

Mr. Trainor. If you will so fix it that we can live and the honorable citizens will not be afraid all the time to do that which we are doing and which our lawyers can not even tell us would comply with the law, we will be happy, because we are willing to comply with any conditions other citizens, similarly situated in this country have to comply with.

Mr. Carlin. I understand you have approved of the bill, so far as it has gone, and simply think you ought to have this other feature?

Mr. Trainor. That is right. We do not think we ought to be made criminals by law for giving out truthful information with regard to the classifications of business or business men or the advertisements that go out when they are grossly false. We feel that when we tell the exact truth and have no penalties, either implied or in any other way, and when you understand that there are only 10,000 plumbers in our association or 11,000, probably now, and that they are approximately 25,000 to 30,000 plumbers outside of it, and that outside of that ten or eleven thousand that we have you must know that there is a very small percentage of them that meet at one and the same time, and that there are men who belong to the association for 10 or 12 years and never attend but two or three meetings. We have not any bureau of information that goes around and keeps them posted. It is only a case of a little journal that we publish that has very useful technical information in it, and this list of wholesalers in our business was primarily intended, when we first published it, to be a bureau of information as to where we could get the goods, because when we started there was no Sherman Act. We were not thinking about the Sherman Act.

Instead of having the larger and more prominent members—people engaged in the plumbing business—having to advise every new man when he came in where he could get certain makes of toilets and tanks, etc., he would get it out of that book, and he could correspond and know just where to write and get everything. So we were not thinking about the Sherman Act. We established that in 1884.

Mr. Carew. Did any of these unfair wholesalers ask to have their names printed in that list at any time?

Mr. Trainor. Not that I know of.

Mr. Carew. It was never refused any of them to have their names put on if they asked for it?

Mr. Trainor. No; because nobody asked to have their names put on. We simply put them in ourselves. They could advertise if they wished to, and they could advertise any goods they had, but we did not run an advertising bureau, and never did.

Mr. Carlin. Would you have inserted the name in your list of any gentleman you considered an unfair dealer, had he asked you?

Mr. Trainor. We never had any "unfair dealers"; pardon me if I answer you that way. We did not say he was "unfair" simply because he was a retailer. We wanted him to exclusively be a retailer when he started to retail. We simply treated him as a competitor. That is a frank, honest statement, but we did not ask anyone else to

refuse to deal with them, and we know that lots of our men did continue to deal with them, and very often had to, because they may be the only supply house in the town that had a supply of goods and we do not stop anybody from buying goods from them; but it meant that those who had better business ideas—it was bad business to help the man along in business who was your competitor and everything of that sort.

Mr. NELSON. You are perfectly willing that the Sherman Act should operate against your getting together to fix the price?

Mr. TRAINOR. Absolutely; and desirous it should do so. The only thing we want to know is, what is the law?

It is exactly the same way in everything. We want it to be made so plain that those "who run may read." If we then violate any rules provided for in the Sherman Act we submit ourselves to punishment.

Mr. NELSON. And if you are not permitted to get together and fix prices conditions within your own ranks will protect the consumers?

Mr. TRAINOR. That is right.

Mr. NELSON. And did you complain also that the wholesaler was discriminating by giving better prices to your competitor?

Mr. TRAINOR. The wholesaler and the mail-order house is the only complaint we have got. If a man goes into our business and competes he will not last long. He will make an assignment.

Mr. MCCOY. What is the remedy for the mail-order house?

Mr. TRAINOR. The mail-order house should not be permitted, I think, by law to fool people by dishonest and untruthful advertising, and the mail-order house, we think, should not be permitted to enter into an agreement or combination with the manufacturer to give them certain goods, which is always the seconds or the thirds, at such a low price, taking, maybe, two-thirds of the output of that factory, at a price that just keeps the factory running, and they always take the defective goods, and then they should not be permitted to advertise those goods as anything else than what they are.

Mr. MCCOY. There is a practice in some of the big storehouses of taking all the seconds from manufacturers, is there not?

Mr. TRAINOR. How is that?

Mr. MCCOY. I say that in some of these big concerns which operate a chain of stores, the very thing which they do which enables them to sell cheaply is to take the seconds and thirds and not the firsts, from manufacturers; is that not a fact?

Mr. TRAINOR. That is right; that is exactly what they do; but they do not tell the people that they are seconds and thirds. The photograph of them looks fine.

Mr. MCCOY. Suppose one of those chains of stores did not advertise at all. How would you reach them on selling seconds?

Mr. TRAINOR. If he did not advertise at all and did not violate the principles of good business in buying by combination, I think he might tell the people, if they got them in there, anything he pleased that might sell the goods. That is the work of the salesman.

Mr. MCCOY. You object to the printed lie, but a lie by word of mouth you would not object to?

Mr. TRAINOR. The printed lie does affect the people very seriously. They think they are getting a great bargain, when, as a matter of fact——

Mr. NELSON. What part of the criminal law prevents your showing up these people that lie or refuting their lies?

Mr. TRAINOR. I do not think there is any machinery you have to bring them to account to the law, unless it be the Department of Justice, and they have got their hands pretty full. They do not have time to look after those things, and they do not know it when they see it.

Mr. NELSON. You do not concede that there is anything to prevent your association from showing up the lies of these fellows, provided you do not advertise something that can be construed as boycott?

Mr. TRAINOR. If we can tell that to our members we do not want anything more than that, but that is what we think we can not do. If we can plainly list the wholesalers in our line, whether we like their business methods or not, we will not fail to list every man who is a wholesaler.

Mr. NELSON. In other words, you are fearful of this, that if you publish a list of the liars, that will be equivalent to a blacklist?

Mr. TRAINOR. We published the other end of it when we did publish anything. We publish the men that were in the wholesale list only. We had not a word about anybody else. If we knew of another man in the country who was not a wholesaler, but was retailing goods we would not put him on whether we had any business with him or not. We were perfectly willing, in that list we published, to put any name on it in any part of the country that confined the business to wholesaling or manufacturing, whether they treated our members good or not.

Mr. CARLIN. The difficulty we are having is that some retailers have asked us to make the law so that prices shall be fixed to the consumer. You are now representing another class, saying that you think that is a wrong thing and ought not to be done. Our difficulty is in reconciling those two objections.

Mr. J. W. BARRY. That was for copyrighted articles.

Mr. CARLIN. Anybody can get a trade-mark, practically. Speaking in reference to the retail drug stores, the man who just preceded you, said that the retail drug stores have the price-fixing idea, which you retailers seem to object to.

Mr. TRAINOR. A man controlling the objected article ought not to be permitted to charge a greater price in one city than in another, or in the same city, barring the cost of transportation and similar things

Mr. CARLIN. That is the law as we have written it.

Mr. MCCOY. What they do claim the right to do is to say that their articles shall be sold at only one price.

Mr. CARLIN. That is to the wholesaler—one price to the jobber, and one price to the retailer, and one price to the consumer.

Mr. TRAINOR. I know this situation, if it is any information to you. I know of a patented article, and a very useful one. It is a gas water heater, which is practically in every modern house of to-day, and they have a list price—the manufacturer's price—and it can not be bought from anyone else except the people who manufacture it. They give, say, 15 per cent off the list, and the article costs $100 in one city, less 15 per cent, and in another city they sell it at no discount. We do not think that is right.

Mr. CARLIN. There are two of those heaters. Can you give me the names?

Mr. TRAINOR. The Pittsburgh is one, and the Rudd is another. Bealer & Humphrey manufacture another machine.

Mr. CARLIN. The Pittsburgh and the Rudd are the two largest sellers, are they not?

Mr. TRAINOR. The Rudd has won through the United States courts in its infringement proceedings, and has got judgments against all the other companies, or practically all. The Pittsburgh concern is paying a royalty to the Rudd now on the thermostatic valves. They are the invention of Rudd, and he, of course, has been sustained by the courts in that. The jacket and the general shape and design of the heater are not patentable, and, of course, the other people make it.

Mr. MCCOY. Why does he sell it at a bigger discount in one territory than any other if he is eliminating competition? The courts have only decided the case within the last six months. It was tried in the district courts of New Jersey, and I do not know whether they have the same price now or not, really, but when they had competition how could they sell cheaper in one territory than in another?

Mr. TRAINOR. My own judgment is—but that is not a fact, that in one territory there was great demand; everybody put them in. Natural gas, for instance, in some localities, was an inducement, and they were within reach of everybody, and there, when they knew that architects and everybody else recommended them they sold at list price. In territories where they were not so popular, where they had to keep men working up the territory, they had added expense.

Mr. MCCOY. And there they sold at a discount?

Mr. TRAINOR. They did, but they put that in with the expense so as to get them introduced and get the public generally to know of the advantages of the heater, and then afterwards intending to put the price up.

Mr. MCCOY. Is that objectionable?

Mr. TRAINOR. If it was only for temporary purposes, it would not hurt anybody much.

Mr. MCCOY. That is the way you get business, is it not?

Mr. TRAINOR. I only mentioned that. You asked me something about it, and I just added this. I have not any complaint to make about that.

Mr. GREEN. The gentleman on the right asked me a question, and I said I would answer when the gentleman got through. If you do not object I will answer now. Your question was what?

Mr. VOLSTEAD. Whether it would not be possible to have mutual associations among farmers or consumers, the same as they have in Europe, to purchase or to sell articles?

Mr. GREEN. Cooperative stores, I think you have referred to?

Mr. VOLSTEAD. Cooperative stores.

Mr. GREEN. The reason cooperative stores will not exist or succeed in this country is that Americans demand service. The public demands a service that the cooperative stores can not supply. Men who would go into the cooperative stores no doubt do so with the very best intentions. We have under no considerations tried to stop them. We know it is simply a matter of a few days, and a little experience.

Mr. MCCOY. How about cooperative buying? Suppose all the farmers in the State of Minnesota formed an organization for pur-

chasing everything that they used, so that they can purchase at wholesale price. Would you think that there was anything objectionable in that?

Mr. GREEN. We never have said anything about it. We do not think it is the right thing to do. We think we can give them a better service. It is up to them. I am only giving my experience and all I have seen, and I have seen a very great number, and within the last year or probably 15 months I have seen four go under in the city of Cleveland.

Mr. VOLSTEAD. What I wanted to know is the difference between this country and the European countries, where they do flourish. Would it make it possible for them to flourish here? I am not expressing for or against them, but the idea has been expressed here that they ought to be encouraged. I want to know why they can not succeed here when they do succeed in Europe. There can not be any question that they do succeed there.

Mr. GREEN. I wish it were possible for every one of you to go and study the thing on the ground, because you would see things in a very much different light. The consumers over there are not getting their goods any cheaper than they do get them out of the independent stores. That is probably a broad statement to make, but it is a fact, nevertheless, and I could prove it to you very quickly if you were there and I could get you the data that will prove it to you. They depend on the dividend, and I have had it said to me over there that they do not object to paying a little more, provided they get the dividend at the end of the year or six months, or whenever the dividend is declared. They have an organization of wholesalers and manufacturers there, just the same as we have here. That is the cooperative stores, mind you, just as much so; and they have succeeded as a corporation and not as an individual buying exchange—mark you, but as a corporation, owning their own shops, owning their own manufacturing establishments, owning their own distributing plant, and owning their own buildings where they retail the goods at the store, and those who belong to the store do trade at the store by paying about a pound, which is about $5, for becoming a stockholder and getting a percentage or a dividend, or whatever you might call it, every six months.

Mr. MCCOY. On what—on the £5?

Mr. GREEN. On the stock or on the purchases they have made. And I say again, positively, that they are not getting their goods cheaper than they bought them at the independent store, and in some instances at a bigger price than the independent retailer will ask them for the same goods. It is a great corporation. We look on the cooperative store over there as an independent proposition, like as if we were starting a cooperative store here among ourselves—the men sitting in this room. That is our idea of the cooperative store in England. It is very far from that. It is one of the biggest corporations on the face of the globe in the food manufacturing and distributing business.

Mr. VOLSTEAD. Is there only one?

Mr. GREEN. One cooperative store? Oh, no; there are several of them. There is a great store in London and great exchange stores throughout England. I forget the names of them. I can give them to you, however.

Mr. VOLSTEAD. Are they connected in any way?

Mr. GREEN. The question whether they are connected I am not capable of answering. I only understand them as separate propositions.

Mr. FITZHENRY. Do they do a credit business?

Mr. GREEN. Oh, yes; they do a credit business.

Mr. VOLSTEAD. How is it with respect to Denmark?

Mr. GREEN. I do not know what the situation is in Denmark. I never went there, but I take it for granted that the same conditions exist there as they do everywhere else. The business of manufacturing and distributing has got down to such a point that there is no possibility of creeping in anywhere at the less expense, unless the consumer himself is willing to assume that expense.

I will not take more than two minutes more. I wish to thank you and to say that if you want to get the information I have it. I have studied the question; I have spent my money and my time to get it, not because I expected to come here, but for my own information and for the information of the men who are engaged in the same business I am.

Mr. MCCOY. Can you set it out in writing, if you do not want to take the time now?

Mr. GREEN. Yes. I would be very glad to give you any information along the cooperative line. I will send you what literature I may have.

Mr. MCCOY. We do not want literature, but what we would like to have, I think, Mr. Chairman, is a summary of his investigations, stated in his own language in the shape of a brief, if you please, to be printed in the record.

Mr. GREEN. Yes; I would be very glad to send it to you.

The CHAIRMAN. We could not undertake to print, you know, all the literature on that subject or any other.

Mr. MCCOY. Not on the trust question, at any rate.

Mr. CARLIN. We will be glad to print your views, and the country will get the benefit of it.

Mr. GREEN. Well, thank you. It is a great question; and, as I said before, here are millions of capital just waiting for an outlet, and if our system of distribution in this country was not the most economical we would not be here to talk about cooperative ideas two minutes. The American people wil have service, and we are here to give it to them.

Mr. MCCOY. If you will permit me, if it won't interrupt, right on that point: You are complaining, I think, or some of the gentlemen who have spoken here have complained, of the mail-order store. Is not that an attempt on the part of capital to find an investment in the line of a cheaper method of distribution?

Mr. GREEN. Exactly.

Mr. MCCOY. Well, then; does not that dispose of your argument that your present method of distribution is not the cheapest?

Mr. GREEN. The fact that we have been able to hold our production or distribution to the extent of 80 or 90 per cent, is, I think, evidence that we can not overlook.

Mr. MCCOY. Why should you object to the mail-order house getting the other 10 or 15 per cent of the business?

Mr. GREEN. The fact of the matter is this, what we we are contending for: We want to get our goods at the same rate they are

getting theirs. I contend that no man has the right to buy a hundred cars at less than I can buy a car.

Mr. McCoy. Then, if I understand your argument, you want to interfere with the movement of capital along the lines which it will take unless restricted?

Mr. Green. No, no. I do not want to interfere with any line of capital—just like this man in the story of the bull and the locomotive—to interfere or to try to restrain capital in any line.

Mr. McCoy. Let me see if we can get together. You claim that the present system of distribution of goods is the most economical, and that therefore it exists. The mail-order house, I presume, claims that the present system, of which you are a part, is not the most economical, and therefore there is room for the mail-order house. They also claim that the greatest economy to consumers can be brought about by wholesale purchasing, and therefore they want the right of purchasing at wholesale, in any quantity they please, and get the benefit of the wholesale price.

Mr. Green. That is, from the mail-order house?

Mr. McCoy. I am only now trying to present what I suppose is the argument of the mail-order house. I do not imagine that the mail-order house can buy a hundred carloads of flour any cheaper than you can, but it can buy a hundred carloads of flour cheaper than you can buy 50 carloads of flour. Is that what you complain of?

Mr. Green. Well, I presume they have been doing that, but I will not say that, particularly.

Mr. McCoy. Is that what you complain of?

Mr. Nelson. He said distinctly that he could not get a hundred carloads of flour for the same price that they would sell it to the mail-order house.

Mr. Green. It is the discriminatory position.

Mr. McCoy. I did not understand that.

Mr. Green. Yes.

Mr. McCoy. You claim that if the mail-order house buys a hundred carloads of flour it gets that hundred carloads cheaper than you can buy the hundred carloads of flour?

Mr. Green. I almost contend that—I say they can get it cheaper than I can buy five carloads.

Mr. McCoy. Do you object to that?

Mr. Green. I do not know why I should not.

Mr. McCoy. I just wanted to follow your argument. The reason why it could get a hundred carloads at a cheaper rate than you could get five carloads is because it can, therefore, distribute cheaper than you can distribute?

Mr. Green. That is just exactly where we can get together. The mail-order house buys a hundred carloads; I want five. They are one individual; we are a thousand individuals. They get a hundred carloads cheaper than my thousand can get 10,000 carloads, because I am the individual.

Mr. McCoy. Then, why would not the logic of that argument lead to the retail grocers getting together and forming a buying organization?

Mr. Green. Now, you are coming back——

Mr. Carlin. Do you think you ought to buy one box of soap at the same price at which you could buy a carload of soap?

Mr. GREEN. I beg your pardon.

Mr. CARLIN. Do you think you ought to buy one box of soap at the same price at which you could buy a carload of soap?

Mr. GREEN. You are putting it in a different way now. Let me say this: A wholesaler doing a wholesale business will buy a carload of soap. Why should I, a retailer, be in shape—other than the common everyday discount, which anybody could get, be subjected to a different price than you, the wholesaler, who is able to buy a few more boxes than I am?

Mr. CARLIN. Your position is that you ought to be able to buy a carload as cheaply as anybody could.

Mr. GREEN. Exactly.

Mr. MCCOY. Then why should there not be a 10,000-carload basis?

Mr. GREEN. That is what I am contending, that 80 per cent of the purchasers of this country, as opposed to 10 or 20 per cent——

Mr. MCCOY. We have got to push the argument along a little bit further. There is an economy, I assume—I have never been in business—in dealing with the one individual, is there not?

Mr. GREEN. Yes; I presume that is true, as far as it goes.

Mr. MCCOY. Would that not justify a lower price for a thousand carloads to one individual than 1,000 carloads to 10 individuals?

Mr. GREEN. I question that very much. Take the city of Washington, if you want to. Some one individual is able to buy a car lot, and here are all the rest of us who are able to buy 80 per cent more than that one. It does not cost very much more to load on the wagons and distribute; it does not take very much more.

Mr. MCCOY. I assumed for the sake of argument, that it was easier to do business with one man than to do it with 10, because of the overhead charges which would come in. Of course, if it is not cheaper, my suppositious statement would not go for anything.

Mr. GREEN. It is not very much cheaper where I have looked into it at the different points of distribution. When it comes to selling it around, it does not take very much more for a carload going to different points than it does for a carload going to one point.

I know that you are tired. I feel that I am just imposing on you.

Mr. MCCOY. Not at all; I think what you have said is very interesting. I confess it increases our difficulties, because you differ with some other people, but we want to get all points of view.

Mr. GREEN. I want to give you the benefit of my experience as much as possible, and we are here to assist you.

Mr. CARLIN. Have you any plan by which we can reduce the cost of living?

Mr. GREEN. I question that very much. I have a little clipping that will show you the conditions long ago. The gentleman asked me something about the "high cost of living," and whether there was any way to get the goods to the consumer cheaper. Of course, you gentlemen here ought to know that as far as we are concerned there is only one person in whom we are interested. The consumer does not know anything about the manufacturer. He knows nothing at all about the wholesaler in a general way, but he does know about the retailer, and they are the only ones that we want to be interested in, and all our thought is given to what we can do, and the great question before us all to-day is, How can we get to the consumer the stuff that we have to sell, at a price that will compare with the

money that they have to pay? But the high cost of living has been a contention for a great many years, and this is a clipping that I got just a couple of days ago:

Voted, That if the Standard for the whole of the Next Quarter, should continue is advanced of one farthing upon Each part in the kitchen, provision yet continuing dear. October 8, 1695.

Voted, That the Standard is allowed the whole of the two columns & sizings & detriments, for balancing the difficulties & extraordinary charges of the extraordinary Charges, by reason of the dearness of provisions for some years last past. May 5. 1698.

It has come down to us from all the ages, and we are still fighting the high cost of living, and to sum up just exactly what I said—the thing we find honestly and conscientiously in every part of our country and in all countries, and I tell you men there is no possible way of getting the stuff to the consumer at a less cost under the prevailing conditions to-day from the manufacturer to the jobber, to the retailer, to the consumer.

You take myself, for instance. I made this statement in Kansas the other day: For 10 years I have been running a store of my own; for 20 years I was on the Cleveland market from 2 to 5 o'clock every morning from April to November. Where would you get a hired man and put him in the cooperative store that will do that? What do we get out of it? You take a man who has been in business 30 years, and at the end of 30 years he owns his own home and maybe a house or two and has got a little income; in 30 years in almost any other line he can retire.

Mr. VOLSTEAD. Could not some of the material be sold by the producer to the consumer and cut out some of the cost?

Mr. GREEN. If I knew and could suggest any way or could find any way to get to the consumer the stuff he should have, I would be the first one to inaugurate it. I want to thank you.

Mr. MCCOY. Mr. Green, if you want to, I am sure this committee would be glad to have you formulate your ideas about cooperative buying and selling. Mr. Seth Low, who was here yesterday——

Mr. GREEN. I am sorry I did not meet the gentleman.

Mr. MCCOY. He was quite enthusiastic in regard to cooperative selling and cooperative buying, and his enthusiasm was based apparently on what he had observed in England and, I believe, in Germany and in other places.

Mr. GREEN. Yes; I have been in Germany, France, and Italy.

Mr. MCCOY. In other words, as I stated a few moments ago in more or less a joking way, you can see that this committee and the Congress is confronted with some very grave problems?

Mr. GREEN. I do.

Mr. MCCOY. That the interests of different people and different lines of business and in different grades of the same business cross each other in as many varieties of ways—innumerable varieties. What we are aiming to do is to get them all into the same line, and it is almost a superhuman task.

Mr. GREEN. Is there any way of getting these diversified interests together themselves—the representatives from each line; these who are of this different opinion? We can write and talk and hear, but if you sit at a table and you and I can talk across the table, you and I will not take but a little while until we can formulate some plan

or idea that will bring out something; and I have thought several times if the men who are far apart on these great economic questions could only sit together, I believe that is the solution.

Mr. McCoy. I have urged that privately with employers of labor a great many times, and I do not see why it could not be done with you in your case, but, of course, on the other side of the whole proposition is the consumer, and you will find amongst consumers a variety of opinions, and how you are going to get them represented except by what you can read in the newspapers is very hard to see, but at any rate I hope the gentlemen who come here will believe that, as I think they will and as I think to be a fact, namely, we are trying to get a solution of that problem that will be fair, and I confess that sometimes I am at a loss to see where a solution is.

Mr. Green. No; it is a great problem, and I want to thank you again, and I have always met with the greatest courtesy before the committees in the House here.

Mr. Carew. You know you are a consumer on your own account?

Mr. Green. Yes; I am quite a consumer.

Mr. McCoy. Is there anybody else here who desires to be heard?

Mr. Moorehead. We have a representative of the retail coal dealers here, and there is some legislation that is specifically directed toward that line, and he would like to be heard for a few minutes.

STATEMENT OF MR. PETER BECK, PRESIDENT BECK COAL & LUMBER CO., HARVEY, ILL.

Mr. McCoy. What is your business?

Mr. Beck. I am president of the Beck Coal & Lumber Co., of Harvey, Ill. Originally our business was coal exclusively, but we added lumber to it.

I am also here in behalf of the retail coal dealers of Illinois and Wisconsin. There are 4,000 retail coal dealers, approximately, in those two States, and we have an association known as the Illinois & Wisconsin Retail Coal Dealers' Association, of which, however, not a large percentage of dealers are members—perhaps 600 in all—and I believe this is the first time that retailers of any kind have been represented over a table of this kind, and certainly not the coal dealers, and we have had continually for years to fight the vilification of the press, who have been hooting at the retail dealer, and all that sort of thing. Our associations have gone together and promulgated correct-weight ordinances in various cities, and wherever there have been dealers who were liable to take advantage of weights we made it impossible for them to do so. So, in Illinois and Wisconsin, so far as those propositions go, we have had a good effect. It is almost a rarity that you can pick up a paper which says anything about the "short-weight coal dealer."

Before coming here I thought it would be of interest to myself to see what spread of margin we had between cost price on cars and delivered price to consumers about 15 years ago. I looked it up, and I found about 15 years ago we had approximately 25 cents a ton more spread between the cost of coal to us on the car and the cost to consumers delivered than we have to-day. At that time we were paying teamsters $2 per day; now it is $2.75. We bought a good team, I

see by our records, for $250; I bought a team two months ago for $500 which was no better. At that time we were paying for hay $8 or $10 a ton; we are now paying $18 to $26; and, consequently, all things have increased, and we are making a far less margin of profit to-day than we have ever made before.

In Chicago—and we are close to Chicago—as in all other large cities, on the hard-coal question, the producing companies maintain their big stock and distributing yards of their own. They practically fix the price, and as far as the retailer is concerned it is too low. They can make nothing out of retail distribution; they make it, if there is anything made—which I am not prepared to say about—in the process of production, but they fix the price by selling at $1.25 per ton more delivered to the consumer than it costs the dealer on-cars. That is in hard coal. Every year we keep pretty careful cost accounts. I prepared a little statement for my own information of costs of handling coal this year, and we found it as follows: Interest, 5 cent per ton; salaries, 30 cents per ton; unloading, 8 cents per ton; depreciation, rent, taxes, and supplies, 10 cents per ton; bad accounts, 5 cents per ton; shrinkages and slate, 5 cents per ton; hauling, 50 cents per ton, or a total of $1.13. That, gentlemen, is what it costs us to handle 8,000 tons of coal.

Mr. McCoy. A profit of 12 cents?

Mr. Beck. We had on hard coal 12 cents; on soft coal, not on all, because in summer we sell less. What I mean by "spread" is a dollar between cost on car and delivered to the consumer. Where we take more to the consumer—10 or 15 or 20 tons—we have been selling at a ratio of a dollar, but in the winter time, when we are obliged to store large quantities of coal, we have to meet the demands of the consumer. We have to have that on hand. It is necessary, in order to prepare that coal, to rescreen it. That amounts to considerable labor, and involves also considerable loss in the coal.

Then, there is another feature in soft coal, and that is pretty nearly every car we receive is short on an average of 1½ tons per car. It is loaded in open car. The coal is probably correctly weighed at the mines, in most instances, but a good deal is shaken off by the jarring and pulling of cars, and a lot is stolen in transfer yards.

Mr. McCoy. How many tons average in the car?

Mr. Beck. An average of 1½ tons.

Mr. McCoy. What is the size and capacity of those cars?

Mr. Beck. The car runs from 35 to 50 tons; an average is 42 or 43 tons—more than any other weight. On soft coal, in the winter, when practically all of it has to be delivered from our yards, we get a "spread" of $1.75. It is what we have always got, and there has never been any agreement or price talked of by dealers, but all over Chicago you will see the price dealers charge usually runs $1.75 above the market. Sometimes it is $1.50 and sometimes $2, according to whether a dealer may have too large a quantity of coal on hand or not. Just now, under the weather conditions, we have too large a stock of coal, and we have advertised that on 2-ton lots we will sell at a dollar below these prices in order to move it. I will say this: That the ability of the average consumer to pay cash is

very slight; only about 10 per cent of our customers have taken advantage of that.

In order to properly take care of our trade we make contracts in the summer time. After years of experience we find that certain kinds of coal are consumed—in the East it is practically all anthracite; in the Middle West the larger amount of it is soft coal, but quite a number have to have anthracite. We sell about 2,200 tons of anthracite and from 6,000 to 8,000 tons, according to the weather, the balance being soft coal. In order to be prepared to take care of our trade we have commenced to store coal. We have a storage capacity of 3,000 tons, and with the soft-coal man we make a contract to take one car a day in May, two cars a day in July, and two cars a day in August, according to the amount we handle, and so on through the winter. We take that coal and pay for it. We have that on hand there to sell. If the weather conditions are warm, then we will not sell that coal. If the weather conditions turn suddenly cold, as it did a year ago the first of January, our town would absolutely suffer for coal, unless our stock and that of one or two other dealers carried such a proportion in stock, it could not be gotten. The mines could not produce coal to supply the demand, and the railroads could not haul the coal and get it to the market to meet the demand. So we are therefore obliged to store and maintain a stock of coal for the benefit of our consumers, and that costs money. We can not do otherwise if we want to properly serve the consumer.

If, gentlemen, after we have stored coal like that and bought from certain concerns whose coal we have found very desirable and that the consumer likes and demands, and have that stock of coal on hand, and that very mine operator comes into our town and sells the consumer in car lots a number of carloads, that very coal that we have stocked there, what happens to us? It either puts us clear out of business or increases the cost of doing business so that when we have to take care of the consumer that does not buy that way we have to charge a higher price. This year we have lost money on account of weather conditions, because the tonnage has been 25 per cent less. We can not reduce overhead expenses. We have got to have that and to maintain a certain proportion of tonnage, and so anything that materially reduces the volume of business we are doing increases our operating expenses and increases the expense to the consumer. If those people from whom we have purchased come in there and sell coal direct to the consumer, which they have a perfect right to do—I do not question that one minute—but if, after having sold to us, they sell to the consumer, they put us out of business.

If it were practical at all for coal to be distributed from the mine to the consumer directly, every coal-producing concern in the country would have direct distributing points; but stop and think how impossible that is. Capital involved in such an investment would be enormous and out of the question, and they could not serve the consumer by so doing, because the consumer generally demands a variety of grades, and this one concern would only be handling their own grade.

I have here a sample of the advertising that we, as dealers, run up against. A dealer from Sycamore, Ill., mailed to our office three copies of newspaper advertisements. One of them was sent to

him and two of them were sent to his trade. This advertisement is by the Martin-Howe Coal Co. [reading]:

Guaranteed coal, on time delivery.

You can get Tecumseh, the guaranteed coal. Highest in B. t. u.'s and lowest in ash and moisture of any coal on the market for the money, plus our absolutely prompt and unfailing delivery.

A very good advertisement for the dealer, excellent for the producer, and good coal of fair quality, but one of his customers brings in this [reading]:

Big fight on the price of coal—

Mailed at the same time—

Consumers saving money. When we quoted our low prices direct from the mine to the consumer on our famous Tecumseh coal we stirred up the coal combine. They assailed us in print, calling us "scalpers" and "mail-order shippers," because we sell direct from the mine and save our customers from $10 to $50 per car. We do this by our direct-sales plan, which eliminates all middlemen, dealers, and it hurts them. So they attack us.

Now, are we "scalpers"? Here are the facts.

This advertisement came to another consumer [reading]:

Save jobber's and dealer's profits. Why be at the mercy of local price fixers when you can get the finest soft coal in the world direct from the mine at mine prices? Why take any unknown, wasteful, poor grade that may be "worked off" in your town, when you can come to headquarters and get coal of guaranteed quality at a lower price?

Mine price only $1 per ton and up, according to grade needed. You can order any amount, from one carload up, at present low prices and have it shipped any time you say before September 1. If you don't need a whole car yourself (about 25 tons) get some neighbors to order with you and divide up. This way you get any amount you want, when you want it, at rock-bottom price.

There is absolutely no objection from our standpoint to people such as these, who own mines, shipping the consumer; nor is there any objection to the establishment of a cooperative yard to handle the coal if they want to; but it is unfair, unjust, and beyond all business principle to ask us to go in and buy our coal from these people, our competitors, when they are selling under our very noses, and it should be perfectly just for us to warn some other dealer, maybe a friend of mine or maybe in general, that these people are after our "goat," in order to keep them from behind our backs, where they would stick a knife in us.

And yet we took these very advertisements to our attorney, Mr. M. F. Galligher, of Chicago, and asked if we were liable under the Sherman Act for just making a photographic copy of those advertisements and mailing them to dealers of Illinois and Wisconsin—no remarks, just mailing those advertisements—and he said, "Gentlemen, with the construction that the Department of Justice seems to be putting on it in its present suits you might be liable." We did not do it. It is just and right to meet on an equal ground, face to face, the men who come out and get behind our backs and do that kind of work. The retailer has been asleep. He has been content to sit down in his little surroundings and just look around at just what he sees there, and has not been ready to go out and defend himself before the general public.

The mail-order houses, backed by Wall Street, are reaping immense profits. The lumbermen are getting at the same thing. They were never able to sell us in our district, but the way in which they

quote their customers there is not any way of making an approximate estimate. They never furnish a list, but their methods of advertising are such that they get the consumer.

Mr. FITZHENRY. Were those advertisements printed in the Chicago papers?

Mr. BECK. In the Chicago Tribune.

Mr. FITZHENRY. All three of them?

Mr. BECK. All three of them.

Mr. FITZHENRY. Did you ever submit the matter to the Post Office Department?

Mr. BECK. No; we have not done that.

I refer to bill No. 1, before this committee. Unquestionably the framers of this bill had some excellent reason for putting a particular phrase in it. I do not doubt but what the reason for it is very good, but I do not think it possible for any man, no matter how intelligent, nor how anxious he may be to serve everybody correctly, to see every aspect of every particular line of goods. You have, on the second page of this bill, at the end of section 9——

Mr. MCCOY. What line?

Mr. BECK. Oh, the line? I am commencing on line 6, page 2.

Mr. MCCOY. Excuse me; is that bill No. 1?

Mr. BECK. That is bill No. 1.

Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or operator of any mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

Gentlemen, that means that after I have stored my coal for the winter's use, not all of it, but I have given an order to-day to my operator with whom I deal on this particular brand of coal I have been advertising, taking a certain amount in the summer time when the demand is light and storing it, and then I base my order on my winter's requirements. If after I have done this, some 4 or 5 or 25 or 40 or 50 people from our town want that coal and go down there and they say, "Gentlemen, we have our coal there in the hands of Beck Coal & Lumber Co., and it is there for distribution."

But those people reply, "Well, but you will have to sell us, because it is provided under such an act." He can not refuse to sell under that act. It may do that particular consumer some good, but it does other consumers an infinite amount of harm, because it has increased the price to them, if it is continued, $1.50. That is one reason why it is unfair.

Another reason is this: Three years ago the concern called "Harmon Coal Co." was organized in Chicago to do a mail-order business. I know that you gentlemen very well know what the "Hocking Valley" coal is, which comes from the Hocking Valley. It is one of the best bituminous coals in the East, and also one of the most extensively used. W. S. Harmon wrote letters to consumers in Minnesota, Iowa, Wisconsin, and Michigan something similar in effect to this, only a little bit stronger. He called the dealer a whole

lot of worse names than this. Then he said "Break the trust up by buying W. S. H. Hocking," and quoting a price approximately less than a dollar a ton below what that could be had for at the mines. Under the interstate-commerce law it is unlawful and punishable by prison to attempt to find out from a railroad or for a railroad man to give the information as to source of a shipment on the railroad. And immediately the retailers of various cities said "Here is Harmon shipping in Hocking Valley coal" to this town, but it is not that coal. We can tell by the looks of it," and they said "Send in car numbers, etc." We said "It is illegal; we can not trace those cars. We are not permitted to find out." However, we were able from other sources than the railroad to find out, and we found that the bulk of that coal came from Cuba, Ill., from a little mine that produced coal that is not fit for general domestic use, a sort of steam coal.

Mr. McCoy. You could reach that matter through the Post Office Department.

Mr. Beck. We could? We did not attempt it. We wanted originally to find out where he shipped from, but we can not do that any more.

Mr. FitzHenry. What was the trade name of that?

Mr. Beck. "W. S. H. Hocking," the initials of W. S. Harmon.

Mr. FitzHenry. Is that the name that all Hocking coal is sold under?

Mr. Beck. It is sold as "Hocking Valley" coal. The idea was to give the impression that it was Hocking Valley coal.

Mr. FitzHenry. Did the advertisement say so?

Mr. McCoy. Hocking was a well-known trade name for that coal?

Mr. Beck. That is so.

Mr. McCoy. And the impression could not be anything else than that it was Hocking Valley coal?

Mr. Beck. That is it.

Mr. McCoy. The Post Office Department can get at anybody who uses the mails in that way. I assure you they are pretty drastic when they get after them. They are more drastic now than in the past.

Mr. Beck. We found those shipments simply originated at some small mines at Cuba, Ill., and Terre Haute, Ind., and equally low-grade coal, and we then informed all our trade it was not Hocking Valley, but that it was simply Indiana and Illinois coal he was shipping.

Mr. McCoy. I do not want to interrupt you. I just want to ask you if your lawyer advised you that you could not give that information without violating or running the risk of violating the Sherman Act?

Mr. Beck. We did not. We informed the persons who wrote us.

Mr. McCoy. I do not want you to act on what I say, because you are not paying me anything for the advice, but I feel reasonably certain that if you were to inform the trade generally that somebody is selling as "Hocking" coal something that is not Hocking coal it would not be a violation of the Sherman Act.

Mr. Beck. At that time the prosecutions were commenced against the Northwestern Lumber Dealers' Association, and that was the

reason for our lawyer telling us to go carefully on that and we do not know yet what the results are going to be in that case.

Mr. McCoy. They did not go after that lumber association, as I am informed, for telling people that such a practice as you have just testified was going on?

Mr. Beck. Practically the same thing; that is just exactly what they are under prosecution for.

Mr. McCoy. For saying that some dealers in lumber are selling spruce as "pine" or what not?

Mr. Beck. They are saying that, and also saying that some manufacturers in lumber are making a practice of selling the retailer in one town at one price and selling a mail order at another price.

Mr. McCoy. And that is what they are after, and that sort of thing has been held in the southern district that the Reader Lumber Co. being a dealer——

Mr. Beck. I know that.

Mr. McCoy. And now the organization of retail lumber dealers engaging in that practice was held to be an organization in combination in restraint of trade, but if it had confined its activities strictly to giving information about fraudulent practices, such as would be recognized as fraudulent in any court of law, under any circumstances, I feel reasonably certain that giving that information would never be held to be a restraint of trade under the Sherman Act.

Mr. Beck. You are probably right on that, but I think that the other phase of it is no less a proper right.

Mr. McCoy. I do not say it is not. I was only meeting your case of this Harmon Co., which was advertising the sale of this Hocking coal and selling something else.

Mr. Beck. This is the point I was coming to on that: We do not or would not and would not dare to attempt to tell the trade from whom they bought that coal.

Mr. McCoy. No; I presume if you and your organization was to do that very thing under that decision up there you would be held to violate.

Mr. Beck. That is just the point. Here I am buying one coal, I am advertising liberally, and I run a set of moving pictures, free to school children when they are accompanied by adults, and these pictures show a complete trip through the mine, all the process of mining and preparing a particular grade of coal that I am furnishing to my trade, "Pyroline," and they are interesting pictures, about 40 views, and they are furnished by the miner or producer of the coal. That is one of my methods of advertising.

We have handled that coal five or six years, and have worked up a big trade, because it takes well. W. S. Harmon, I do not know whether he tried it with them, but he tried to buy his coal from other reputable producers, and they said, "We will not sell you. You can not have our coal. We are not going to permit you to hock it over the country as a substitute for something else." He was able to get coal from some small operators, producing a grade of coal that they could not easily dispose of.

Mr. McCoy. Was he planning to sell coal under your name "Pyrolite"?

Mr. Beck. Oh, no; he was trying to sell it for "W. S. H. Hocking." There are none of these mail-order houses who can sell coal

unless it is a substitute. Their expense of advertising and everything is so enormous that they can not touch the retailers' methods, without doing some such thing as that.

Mr. McCoy. I just want to suggest that you take the matter up with the Post Office Department. I think you will get a speedy remedy for that.

Mr. Beck. It is possible we could get a speedy remedy, but we could not if some particular coal operator wanted to connive with them and wanted to indulge in that sort of practice, and if the provision you have in this bill goes through he would be compelled to sell to just such fellows as that.

Mr. McCoy. You know what they do in the Post Office Department if they are satisfied that a man is using the mails for deceptive advertising. They issue a "fraud order" against him, and he can not get a single piece of mail, and I have had it under observation in another committee, and it is very effective.

Mr. Beck. We are getting some suggestions, I guess we have not thought of carrying out.

Mr. McCoy. It is the most effective thing I know of to put a man out of business to issue a fraud order against him in the Post Office Department.

Mr. Beck. Mr. DeWoody, of Chicago, has all the advertisements circulated by Harmon. I never got him to take any actions.

Mr. Dyer. Mr. Beck, do you not think if that last part of this section you were reading, which you object to, refusal could be had from selling to such a person as you have mentioned, on the ground they were not a responsible firm, corporation, etc.?

Mr. Beck. They might be financially responsible.

Mr. Dyer. Things enter into that besides financial capacity.

Mr. McCoy. I do not think any man could take the risk of going to jail under the Sherman Act by refusing to sell a man whom he thinks is financially capable.

Mr. Beck. I think if this act goes through he would have to sell him.

Mr. McCoy. A mere matter of cash.

Mr. Beck. I have one customer I will not sell. I have sold him to my sorrow, as he has some ways of doing business I can not stand for. He makes all sorts of complaints and everything else. He accuses me, even if I put overweight on the wagon, and I come back and go to a lot of expense taking the coal out and find it weighs all right; or he may find he is discovered and remove some of the coal and then assert it is short weight. We do not want to sell that customer; we do not want to have anything to do with him. I can not see exactly why a mine operator producing coal should be compelled to sell everybody if the wholesale grocer should not be compelled to sell everybody, or the wholesale shoe dealer, etc., are not also under the same act.

Mr. McCoy. It is looked upon as being a different sort of thing. It is looked upon in the same way that any so-called natural product is looked upon, and that is why it is in there. As you know perfectly well, lots of people claim no private individual has anything to do with the natural products; that they ought to be a Government monopoly. It was with that idea in mind that the framer was led to place such a provision in the bill.

Mr. BECK. It is no matter who produces the coal so far as the retailer is concerned. It would make no difference whatever who produced that coal, whether it is the Government, whether it is an enormous monopoly, or whether they are individual producers, the problem that concerns us is distribution of the coal.

Mr. MCCOY. That accounts for classifying coal in a different classification from that which you put on groceries and other things, because coal is a natural product. I am not justifying it, but I am saying that is the underlying thought.

Mr. BECK. I see that point.

Mr. MCCOY. The same way with iron ore and such things as are in the earth and simply have to be taken out.

Mr. BECK. Gentlemen, I have got to the point where I want to say something, and that is simply this: That a retailer ought to be given the right of publicity; the right to tell the truth, so that when a retail coal man—and the same applies to every other class of trade—prepares himself to take care of the coal-consuming public, or whatever consuming public they may be, in the best possible manner, to have the material right there when they need it and when they want it, delivered just as they want it. And we are obliged to give credit; we can not get out of it. I have tried every possible way. I have advertised that I could cut down office expenses 50 per cent if I could sell for cash. It does not do any good, because the trade has not got the cash at the time that they want the coal. Whenever you inject into a local situation such a thing as shipping in a lot more coal than we are prepared for you increase our cost of doing business, and if you go on you increase the cost to the consumer. In other words, a party of consumers can go and buy a dozen car lots of coal at slightly less price, but very little less, because at any time I am prepared to meet anything of that kind. If anybody wants a carload of coal we do not want to get anything out of it except the teaming. We are willing to take it and deliver it for the sake of the teaming; but it is not even giving us the worth for our teams, so that our teams may be earning a living. Then, take the advantages of tonnage. We get a favorable increase on the cost of doing business on the other customers, and the other customers can not buy for cash and they have to pay the difference. And I claim, therefore, that we are entirely justified in our request to ask the right and permission to give publicity in anything of this kind; that if a mine operator wants to be a retailer, let him be a retailer; let him retail his coal, but he must not expect from the retailer his trade when he is retailing to the consumers' trade. He can not expect it; he has not a right to expect it, and it does not benefit the consumer, but makes him all the worse off in the increased cost of living by so doing, and it is because the retailer has never appeared before the public, because he has permitted all these things to go on in the newspapers, misrepresenting him, and have the consumer generally get the idea that he is to blame for the whole thing, that his condition at present is deplorable.

There are hundreds of country towns where business is growing less every year, and business men are going out of it, moving elsewhere, or, as one mail-order house said in their letter—Montgomery Ward & Co.—that they are going to put the retailer out of business; that if there is not business enough for the retailer, let him be a

farmer or do something else. I think Mr. Moorehead has the original letter.

Last year a very severe cold spell came on us, and there was a terrific dearth of coal all through the Middle West—Illinois, Iowa, Wisconsin, Michigan, and Minnesota. Why? Because the local dealers were, any number of them, afraid to store coal during the summer time. They know there are a lot of those shipments coming into town, and they can never tell what is coming in. The cold weather came; the mines could not produce coal fast enough, and the railroads could not deliver coal fast enough, and there was considerable suffering. We had 2,300 tons on hand, and before the end of the winter, despite all our efforts to get the coal in, our bins were empty.

I thank you for this opportunity to speak. It is certainly a great privilege to a young man who never saw Washington before and who had no thought of coming here to have this opportunity.

Mr. McCoy. To get off onto another branch of the matter, if you are through on that?

Mr. Beck. I am.

Mr. McCoy. Do you see any difference in the situation now from what it was before the law was passed forbidding railroad companies to own and operate mines?

Mr. Beck. I do not believe that I do. Our hard coal is the only thing affected by that, and, of course, we have to pay the price for hard coal. There is this one thing about it that perhaps makes it better for the retailer and consumer, although this committee might look upon it as being inimical to the consumer, and that is the fact that we always know what price that coal is going to be. We know that in the warm season a lot of overproduction is not going to reduce the price and make us face a loss, as we have this year.

Mr. McCoy. As a matter of fact, there has not been any change in the situation so far as ownership is concerned, because the Supreme Court has held that a separate coal company may be authorized and the stock in it may be held by the railroad company.

Mr. Beck. There is one thing I would like to ask in connection with that, and that is a question for the Interstate Commerce Commission to answer: Why, for about an equal distance, we only pay $2.05 freight for coal from West Virginia, and we have to pay $3.25 on hard coal from Pennsylvania?

Mr. McCoy. There are a lot of those questions. I live in one of the Oranges in New Jersey, and I believe we have to pay on coal that goes through—at least more for coal similar to what goes through—to Jersey City than they pay in Jersey City.

Mr. Beck. That is the tidewater arrangement they have on that. I can not say there is any difference, because so far as we know it is just the same ownership of hard coal (anthracite) to-day as it has always been, and we are buying it through the same sources, and we do not know any difference.

Mr. McCoy. Mr. Volstead says he thinks that somebody suggested the parcel post had had some effect on the general situation we have been discussing. Is there anybody here who has any views to express on that point?

Mr. Volstead. Some one intimated that during the hearing.

Mr. BECK. It has been a tremendous benefit to the large mail-order houses, we know.

Mr. VOLSTEAD. He had some figures on the subject. He may not be present here now.

Mr. TRAINOR. I believe the parcel post is a decided benefit to the mail-order houses, and I believe it is a decided benefit to the people, too. I think that part of it is operating all right. I know of a good many articles that come through the parcel post with very satisfactory results, and very economically. I really think that the parcel post is going to supply a useful place, to help to regulate the cost of living and the safe transportation and prompt transportation of a class of goods that it is suitable to carry.

Might I ask if the proceedings of this hearing will be published?

Mr. MCCOY. They will be printed.

Mr. TRAINOR. Would it be asking too much for you to send us some copies?

Mr. MCCOY. The clerk, Mr. Carlin, will take your name and will be glad to mail them to you.

I do not know whether there is anyone else here who would like to be heard. If so, we will be glad to have them say so.

Mr. MOOREHEAD. I have the original letter from Montgomery Ward & Co., which I would like to read to this committee, as declaring the purpose and aims and object of that mail-order house against the retail merchant. May I read it?

Mr. MCCOY. Certainly.

Mr. MOOREHEAD. If you please. [Reading:]

[Established 1872 by A. Montgomery Ward and Geo. R. Thorne. Montgomery Ward & Co., New York, Chicago, Kansas City, Fort Worth, Tex., Portland, Oreg. Originators of the catalogue business.]

CHICAGO, *September 26, 1912.*

H. S. WEBSTER, *Norway, Iowa.*

DEAR SIR: Your letter has been received by Mr. Curtis, and he is very sorry to know that you do not think it is to your advantage to place your orders with a mail-order house.

When this business was established, 43 years ago, it was with the intention of supplying the farmer and the man living in small towns with city merchandise at city prices. At that time the country merchants were charging prohibitive prices and giving merchandise of a poor quality.

We are pleased to say that during recent years the average merchant has changed his policy and is at the present time giving the consumer more and better values for his money. However, it will be impossible at any time for the small dealers to equal our price or our qualities. We buy in large quantities only, and of course are able to get our goods at a reduced price. We give our customers the benefit of this reduction. In several cases we have found that the manufacture of certain articles has become to thoroughly monopolized that we can no longer purchase them at a reasonable price. In cases of this kind, in order to still give our customers a reasonable price, we have taken over the manufacture of some things ourselves and sold them to our customers at a price lower than they could be purchased at wholesale.

You will find this true by actual comparison of our stoves, paints, hardware, and more particularly tools. Our vehicles also are manufactured in our own factory, and are sold to the consumer at just about the average wholesale price.

We think and know that if you will give the matter consideration you will agree with us that a business of this kind, conducted as this one is, is the ultimate solution of the high cost of living, and we do not think that it would mean the ruination of the small towns or any reduction in land values to have trade centralized. On the other hand, we are under the impression that it would be a benefit to all. The retail merchant at the present time belongs to that great class of middlemen which are neither producers or consumers.

We know that the time will come when, except on a very small scale, the middleman will be entirely eliminated. You will naturally ask "What will become of the country merchant?" In reply to this question, we would say that he would become a producer; perhaps be a farmer or engage in some other business that would mean that he could give something to the community instead of taking away from it, as he now is.

We wish that you would go over these matters as we have stated them to you and give it a little more thought. We think that in the end you will agree with us and that you will see that the real solution of the present problem, "high cost of living," comes in the centralization of trade.

We thank you for your courtesy and frank reply to our letter, and sincerely hope that you still may be able to see your way clear to favor us with an occasional order.

Yours, very truly,

MONTGOMERY WARD & Co.

Mr. McCOY. The committee will now stand adjourned until 10.30 o'clock to-morrow morning.

(Whereupon the committee adjourned to meet to-morrow, Friday, February 6, 1914, at 10.30 o'clock a. m.)

TRUST LEGISLATION

UNIV. OF MICHIGAN,
MAR 5 1914

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 6

STATEMENT OF

MR. FELIX H. LEVY

FEBRUARY 3, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Statement of: Page.
Mr. Felix H. Levy, of New York 231

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

N Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
LES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
RT Y. THOMAS, JR., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
RLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
ER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
EL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
BEALL, Texas.	LEONIDAS C. DYER, Missouri.
H TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 6.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 3, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will hear to-day, from Mr. Levy, of New York.

STATEMENT OF FELIX H. LEVY, ESQ., OF NEW YORK, N. Y.

The CHAIRMAN. Please give your name and address to the reporter, and state anything which you may think proper, showing your familiarity with the Sherman antitrust law.

Mr. LEVY. I am a practicing lawyer in New York City. My address is 37 Liberty Street. I was special assistant to the United States Attorney General, and special counsel to the Department of Justice from March, 1905, to June, 1907, for the special purpose of prosecuting the Tobacco Trust.

In October, 1911, I was counsel for the independents in the tobacco industry in opposing the disintegration decree of the Tobacco Trust in the proceedings before the Circuit Court of the United States

in the city of New York, which resulted in the adoption and approval by the court of that decree, after it had been proposed by the trust and virtually accepted by the then Attorney General. Quite recently, terminating last Friday, I was counsel for one of the great trade associations, the National Wholesale Jewelers' Association, against which the Department of Justice last June began a prosecution under the Sherman antitrust law, and that prosecution was terminated last Friday, January 30, 1914, by the entry of a decree upon the consent of counsel for the two associations that were interested.

From June, 1913, to January, 1914, I was very active in defending that proceeding.

Those are the three more important matters in which I have worked under the Sherman law. And I have had other incidental experience under it.

I am prepared to give you my views, Mr. Chairman and gentlemen of the committee, with reference to the pending bills before your committee. I understand that is the matter which the committee is called upon to consider.

The CHAIRMAN. We will be very glad to hear from you in regard to that, Mr. Levy.

Mr. LEVY. In view of the fact that I shall find it necessary to point out several grounds of objection to many, if not all, of the pending bills now under consideration before your committee, I think it proper to say that, in doing so, I shall make such criticisms from the standpoint of one who regards the Sherman law with favor and who believes that, on the whole, it has been a highly beneficial statute. Moreover, I shall make such criticisms from the standpoint of one who is a follower of the present national administration and an admirer of the present head of the national administration, as a Democrat, and a southern Democrat, although I live in New York City and practice law there.

I have said that I regard the Sherman antitrust law as a statute which has been, on the whole, highly beneficial to this country. In support of this statement, I refer, by way of illustration, to the case of the Northern Securities Co., the powerful holding company which in the year 1904 was disrupted by the order of the Supreme Court. The court based its action solely upon the provisions of the Sherman law. If that law had not been enacted and had not then been in existence, the Northern Securities Co. would in all probability have been permitted to continue in undisturbed existence, and would thereby have served as a basis and an example for a similar union of the remaining railway systems of this country.

The result would soon have followed that all of such systems would have been brought within the grasp and control of a few powerful individuals. The menacing and dangerous situation would then have been presented that less than perhaps a dozen men would have controlled, at their own will and pleasure, the entire railway facilities of this country. It is impossible to make an accurate estimate of the dangers which would have ensued from such a situation, dangers which were averted solely by reason of the existence of the Sherman antitrust law. Similarly, it can not be doubted that if the Sherman law had not stood in the way of the continued and undisturbed existence of the great Standard Oil Trust and the great Tobacco Trust

(although I realize that the dissolutions of those iniquitious combinations were most unsatisfactory), and of other like combinations, ingenuious, resourceful, and powerful individuals would have extended even further the alarming conditions which have so greatly disturbed the economic student within the past few years—conditions which I think may justly be called disturbing because of the reasonable fear which they engendered that substantially all of the important industries of this country and its banking and financial facilities would be placed within the control of a very small number of individuals.

In making the suggestions which I shall make here to-day, I trust I will be pardoned for saying that they are based, not upon merely academic views concerning the operations of the Sherman law, but upon an active professional experience as a lawyer with the practical operations and enforcement of that law.

My professional experience with respect to the Sherman law has been both as a Government prosecutor and in private practice. From March, 1905, to June, 1907, as I have already said, I was a special assistant to the Attorney General, and special counsel to the Department of Justice in the prosecution of the Tobacco Trust. In that capacity I assisted in conducting grand-jury investigations, both in New York City and in Nashville, Tenn., of various phases of the operations of the Tobacco Trust. As a result of those investigations, which were, of course, based upon the Sherman antitrust law, I assisted as one of the Government counsel in the finding, and in the trial, of indictments for violation of the criminal section of the Sherman law, which were found by the grand jury against certain subsidiary companies of the Tobacco Trust and their officers. I will refer to this criminal prosecution later on in connection with my consideration of the bill now before you, which aims, in the popular phrase, to make guilt personal.

In private practice I was, subsequently, in November, 1911 (to which I have also previously referred), of counsel for independents in the tobacco industry in opposing the confirmation by the United States circuit court in New York City of the plan of disintegration of the Tobacco Trust which was proposed by them, and substantially approved by the then attorney general.

Still later, in June, 1913, I was counsel for the National Wholesale Jewelers' Association in the Sherman law proceedings, which were instituted by the Government against it and also against the National Association of Manufacturing Jewelers. This case terminated, as I have already mentioned, last week, on January 30, 1914, by the entry of a decree upon consent of counsel for the defendants.

As a basis for the suggestion which I shall urge that the Sherman law in its present form is a most drastic and efficient statute and, therefore, does not require amendments as to its substantive provisions (and in saying that I do not allude to the suggestions of bills for prohibiting interlocking directorates and the like, because they do not constitute amendments of the Sherman law), I deem it important to point out that, in spite of the "rule of reason" and the claim that the Sherman law was thereby weakened and, as is often said, emasculated, the antitrust statute was found quite drastic enough to meet the very mild situation presented in the Jewelers' case.

These associations are trade associations or boards of trade. The country is full of them. They represent various business houses and various industries, very substantial concerns, and differ from the kinds of concerns that make up the typical trust. We will say there will be a jobbing house in Duluth and another in Minneapolis and in other cities and they will get together and form a national association.

Mr. NELSON. For what purpose?

Mr. LEVY. I will explain. In this case the defendants were the two great national trade associations in the jewelry industry—one the wholesalers and the other the manufacturers. The Government charged that these two associations and their members had come to an understanding whereby retailers would be precluded from buying directly from manufacturers. The wholesalers contended, and it was conceded that the contention had great force, that on account of the large number of articles in the jewelry business the most economical method of distribution was through the wholesaler. The Department of Justice insisted, however, that these claimed economic advantages were immaterial and that the Sherman law forbade any agreements or understandings by which the free flow of interstate commerce was materially and directly restrained, without regard to any benefits which might ensue.

The Government made no claim of wicked or oppressive conduct, such as has notoriously characterized many, if not all, of the great typical trusts like the Standard Oil Trust and the Tobacco Trust.

The Government charged—there were two associations in the jewelry industry, one the National Wholesale Association and the other the Manufacturers' Association, and the Government said those two associations had gotten together in some understanding or agreement to prevent the retailer in the jewelry business from buying directly from the manufacturer. The Government charged that the wholesalers got together in their association, consisting of 172 firms scattered all over the country, firms constituting the Wholesalers' Association—the Government charged that they got together and said, We will notify the Manufacturers' Association that if they sell directly to any retailer in jewelry we, collectively, will not buy from that manufacturer.

That, in substance, was the situation. I have the bill here and the decree, and I will put them in the record if you desire.

It presented a somewhat but not entirely novel situation, in which the Sherman antitrust law was being invoked, not against the typical trust, but against this board of trade arrangement, a very common thing and, as they argue, a very beneficial thing. But I will not dilate upon that.

My point now is, if the committee please, that the Sherman antitrust law was drastic enough, clear enough, efficient enough to reach that mild situation, where these boards of trade were not organized for profit, where there was no intimation of oppressive of immoral business practices, and the Government prevailed in its suit and we consented to the decree. The Government first asked for a grand-jury indictment and later modified that to an equity decree, realizing that the firms involved were of undoubtedly high standing.

My one point is that the Sherman antitrust law was sufficient to meet that mild situation, and, therefore, of course, as we have lately

seen, it is equal to meeting the situation in regard to the telephone company, and the New Haven Railroad, and the Eastman Kodak Co., and the General Electric Co. I mention these specific names, because they have been subjects of attack by the Department of Justice, although I am not sure about the Kodak Co.

As I have already said, the Government made no claim of wicked or oppressive conduct in the Jewelers' case, such as has notoriously characterized many, if not all, the great typical trusts like the Standard Oil and the Tobacco Trust.

Despite all these facts, which show that extremely mild situation—one, in fact, which many claimed was on the whole beneficial and not hurtful to the trade and commerce of this country, and despite the fact that the Sherman law when enacted was aimed entirely at the great typical trusts, and did not have in contemplation those great trade associations, or boards of trade, whose other activities, even the Government conceded to be commercially beneficial—in spite of all those circumstances, the Sherman law, so far from needing strengthening, or more precise and exact definition, was found to be sufficiently clear, drastic, and far-reaching to bring within its prohibitions the comparatively mild situation which was presented in that case.

In trades like the jewelry trade, grocers, and the hardware trade, where the articles dealt in are exceedingly numerous—thousands of different articles, all more or less small, and not of very great value—everybody concedes that the wholesaler is a commercial necessity. He has come to be a central bureau for extending credits and the like, because manufacturers can not deal directly with thousands of retailers.

The result thus reached shows conclusively that the Sherman law, as it stands to-day upon the statute books, interpreted and defined as it has been during the past 24 years by judicial decisions, which decisions are merely the continuations of countless similar decisions upon the subject of restraints of trade and attempts to monopolize, which have been rendered by the State courts of this country from the time of the adoption of our Constitution and by the courts of England for centuries past, under the ancient common law of England, is a statute of drastic and far-reaching effect, with its provisions adequately defined and readily applied. It seems safe to say that in these respects it is a statute far more efficient and easy of application than most of the statutes with which courts are dealing every day. As it stands to-day on the statute books, the Sherman law is more nearly a self-enforcing statute than any important statute that can be mentioned.

I hope I may be pardoned for saying that my experience of 20 years with the Sherman law convinces me that that statement is absolutely correct. I shall even be bold enough to say—I am going to say that in the aspect presented by the President, in his recent message stating the position of the administration toward the business interests of the country, as one in which mutual cooperation is invited, based, however, upon proper observance of the Sherman law—I say that attitude, plus the attitude of the Department of Justice in its rigid requirement that the terms of the Sherman law shall be obeyed, as in the Jewelers' case; I say that with the clarity which the Sherman law now reached, it is difficult to conceive a more

efficient and, as I would call it, self-enforcing statute or a more desirable situation. Certainly, in the Kodak Co., the General Electric Co., the New Haven Railroad, the Jewelers' cases, it has been self-enforcing, because there the defendants surrendered and laid down without contest.

Accordingly, in my judgment and if time permits, I shall to-day try to show it by a detailed exposition of the subject, as to the substantive provisions of the Sherman law, there exists to-day no need whatever of any amendment by way of definition or other similar modification; but, on the contrary, unless the attempt so to define or modify the statute be made with the most scientific and discriminating care, and perhaps even then there will arise the most serious risk that such definitions or modifications will cause fundamental disturbance in the interpretation and construction of the Sherman law, which might readily result in a renewal of the long years of litigation and uncertainty in the interpretation of the law as thus amended, which so lamentably marked the first 10 years of the history of that statute after its enactment in 1890.

If the committee please—and I do not mean to bore the committee; I am here to treat the matter as a lawyer, and I have no other interest in the subject than a lawyer ought to have in a legal subject—I am going to give you a survey of the course of the Sherman law as indicated by three or four prominent decisions.

It is the uniform opinion of those who have carefully studied the subject that no statute was every passed by Congress involving a question of substantive law, which received more thoughtful attention at the hands of profound and capable lawyers in Congress than the antitrust law which was adopted by Congress and became a law on July 2, 1890.

It may be broadly asserted that, with the exception of such parts of the statute as relate to matters of procedure and practice, and with the further exception that the second section of the statute is, in an immaterial sense, an enlargement of the common law, the statute itself amounts to no more than a declaration of the common law upon the subject of restraints of trade.

It is well settled that in the Federal jurisprudence the common law with relation to crimes has no existence. It was on account of this fact and the further fact that prior to the passage of the Sherman antitrust law there was no Federal statute governing the subject; that until the act of July 2, 1890, there was no jurisdiction in the Federal Government to prevent or to punish restraints of trade or unlawful conspiracies and combinations to restrain trade.

In the course of the debates in the Senate which culminated in the passage of the law, Senator Sherman said:

> It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.

In the course of the same debates Senator Vest, of Missouri, said:

> We have affirmed the old doctrine of the common law, in regard to all interstate and international transactions and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in, also, a grave penalty.

The statement is ventured that all of the prevailing decisions of the United States Supreme Court under that law would have been

decided in the same way in which the Supreme Court has decided them, if the Sherman law, so far as its substantive provisions are concerned, had merely provided in proper phraseology that the existing common law on the subject was declared to be the law of the United States and had provided appropriate penalties.

The whole body of the law of the State of New York up to a few years ago, when a rage for innovation sprang up, was contained in these three lines, which is a clear crystallization of the entire common law on the subject of restraints of trade:

> If two or more persons conspire * * * to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor.

The revisers of the Penal Code of the State of New York, able lawyers of their day, who drew this provision, stated that it was intended to be merely an embodiment of the common law.

My point is this, that those words are really no different in their effect than the Sherman law as it stands to-day. Each of them contained words that have been adjudicated over and over again in thousands of decisions. Under that simple provision of the Penal Code of the State of New York, I could cite to you scores of New York decisions where restraints of trade were checked and punished criminally and civilly under that simple statute just as effectively as under the Sherman law; and the New York statute has been found quite drastic enough to reach the practical situations involving restraints of trade that have come before the criminal courts and the civil courts of the State of New York without any amplification such as has been suggested in the bills now pending before your committee.

I will now proceed to show why it was that in the face of the real simplicity of the Sherman law that the subsequent confusion arose. It arose out of the Knight case. (U. S. *v.* E. C. Knight Co., 156 U. S., 1.)

The first case of importance, in fact, the first case of any description, under the Sherman law, which received the attention of the United States Supreme Court was the case of the United States *v.* E. C. Knight Co., popularly known as the Sugar Trust case. In that case it was charged by the Government that the defendants—

> being in control of a large majority of the manufactories of refined sugar in the United States, had acquired through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business.

The court below dismissed the bill, the Circuit Court of Appeals dismissed the bill, and the Supreme Court affirmed the dismissal. It is a most perplexing and confusing decision. The lawyers on this committee appreciate, I am quite sure, that it is a confusing decision. The best view was that it related only to manufacturing; the case was very imperfectly tried; and inasmuch as it related only to manufacturing within the State of Pennsylvania, it seemed to be an intrastate and not an interstate transaction.

The subsequent history of the Sherman law shows that the effect of this decision was most unfortunate. The confusion and the erroneous impressions which were caused by it are best exemplified by the statement contained in a report made to the House of Representatives by Attorney General Harmon on February 8, 1896, in response

to a resolution of the House adopted on January 7, 1896, requesting the Attorney General to report what steps, if any, had been taken by him—

> to enforce the law of the United States against the trusts, combinations, and conspiracies in restraint of trade and commerce, and what further legislation, if any, is needed to protect the people against the same.

In this report the Attorney General said:

> The act of July 2, 1890, commonly called the Sherman antitrust law, as construed by the Supreme Court—

Thereby evidently referring to the Knight case—

> does not apply to the most complete monopolies acquired by unlawful combination of concerns which are naturally competitive, though they in fact control the markets of the entire country, if engaging in interstate commerce be merely one of the incidents of their business, and not its direct and immediate object. *The virtual effect of this is to exclude from the operation of the law, manufacturers and producers of every class, and probably importers also.* * * * The limitation of the present law enables those engaged in such attempts to escape from both State and Federal Governments, the former having no authority over interstate commerce and the latter having authority over nothing else.

The sentence which says, "the virtual effect of this is to exclude from the operation of the law manufacturers and producers of every class, and probably importers also," makes clear that the learned Attorney General misconceived, and it is perhaps proper to say, that he quite naturally misconceived the true scope of the Sherman law as a result of the unfortunate decision in the Knight case.

Putting it in plain English, the Attorney General reported that as a result of the decision in the Knight case the Sherman law did not apply to any industrial combinations at all, and apparently applied only to transportation, because, to use his own language it—

> does not apply to the most complete monopolies acquired by unlawful combinations of concerns which are naturally competitive, though they in fact control the markets of the entire country if engaging in interstate commerce be merely one of the incidents of their business, and not its direct and immediate object.

Subsequent decisions of the Supreme Court, notably in the Addyston case, the Traffic cases, the Standard Oil case, the Tobacco case, and many others clearly show that the opinion thus expressed by the Attorney General was erroneous. This circumstance is of importance when it is considered that, as a result of this misconception, which it may be added, was shared by the profession generally, the Sherman law was for a long time deemed to be inapplicable to the many varieties of trusts and other industrial combinations which soon thereafter, and probably because of that decision, began to increase until nearly every branch of trade came under their domination.

It seems safe to assert that no single circumstance was so potent in depriving the Sherman law of the effectiveness which was subsequently imparted to it by later decisions of the Supreme Court as the decision in the Knight case. My point is that the Knight case caused this confusion, and I will show how it was afterwards corrected and the law restored to its drastic state.

In all of the conspicuous cases involving attacks by the Government under the Sherman law against trusts or industrial combinations the Knight case has been cited by the defendants as justifying their contention that the Sherman law is not applicable to such trusts

or industrial combinations. Indeed, counsel for defendants in some of such cases have boldly asserted that the adjudication by the Supreme Court in the Knight case had become a rule of property and that to overrule it would make wrecks of the enterprises inaugurated by the combinations then under attack.

There can be no doubt, however, that beginning with the Addyston case the Supreme Court, in a uniform line of decisions culminating in the Standard Oil and the Tobacco cases, has distinguished the force and application of the Knight case to such an extent as, for all practical purposes, to overrule it.

It is a fact well recognized by expert students of the subject that the misconception which the decision of the Supreme Court in the Knight case caused was responsible in a very high degree for the fact that thereafter the Sherman law remained for many years virtually a "dead letter" upon the statute books. Instead of serving as an effective deterrent to the continuance of monopolistic combinations, as its framers intended it to be, the Sherman law, as thus seemingly devitalized by the Supreme Court in the Knight case served, for several years thereafter and until the misconception caused thereby was by later decisions corrected, rather as high evidence of the impotency of the Federal jurisprudence to cope with the subject at all.

In the Addyston case the court below followed the Knight case and dismissed the bill. The circuit court of appeals reversed, the Supreme Court sustained the reversal and set aside the authority of the Knight case as denying to the Sherman law the power to reach industrial combinations. The court said the Sherman law did have that power.

The decision in the Addyston case thus first corrected the widespread misconception which had theretofore existed with respect to the applicability of the Sherman law to industrial or trade agreements or combinations. It is highly important to note that from the time of the decision in the Addyston case no misconception or doubt any longer existed, or at any rate needed to exist, and that thereafter the decisions of the Federal courts in construing the Sherman law as bearing upon industrial agreements and combinations of the kind which were then and ever since have been so common, moved forward in an unbroken line to the effect that such agreements were within the purview of the Sherman law, and that combinations or agreements such as characterized the Sugar Trust and other like combinations were forbidden by that law.

The check upon the enforcement of the Sherman law which had been placed upon it as a result of the Knight case was thereby removed. Unfortunately, however, in the meantime the Sherman law had for all practical purposes become dormant and impotent, so that the promotion and formation of industrial combinations and trusts proceeded with renewed vigor, and the industries of the country were virtually taken out of independent and competitive ownership and placed under the control of monopolistic combinations.

I repeat the assertion that this result, the evil effects of which are still so manifest, is attributable to the decision in the Knight case more than to any other circumstance.

The CHAIRMAN. Mr. Levy, the committee do not desire to interrupt you in the manner of presenting your argument, but the article

from which you are now reading to the committee seems to be already in print and will be put in the record; and inasmuch as you have told us that you had some criticism to make of such measures as the ones before us, would it discommode you to print in the record the text of the article you are now reading and give us your views on the measures before us?

Mr. LEVY. I realize that this course is taking up time, and I am very anxious to curtail it as much as possible. It would be a little difficult to change my course of presenting the matter, but I am going to do it.

The CHAIRMAN. We are liable to be called over to the House at any moment.

Mr. LEVY. I realize that. I will just allude to it but will not read it, because you have suggested that it be put in the record. I will simply hurry along and refer to the printed document, and pass on then to the decisions in the Oil and Tobacco cases, in which the "rule of reason" was enunciated, and then follow your suggestion, which is a very proper suggestion.

I wish to invite the attention of the committee to the argument which I set out here, to the effect that the "rule of reason," instead of weakening the statute, has strengthened the statute. I can not now elaborate on that, but it is set out fully and adequately in the printed article which will be annexed to my testimony. But I will allude to the fact that since the Tobacco case was decided there have been 8 or 10 decisions by the United States Supreme Court, beginning with April 22, 1912, and extending to June 9, 1913, every one of which lays down the principle of the Sherman law more drastically than before the "rule of reason" was enunciated in the Tobacco case.

All that will appear in this pamphlet that I speak of.

Mr. CARLIN. You do not think, then, that any legislation should be had to affect the rule of reason?

Mr. LEVY. I do not, sir. If I could read to you one single decision of the Supreme Court in a very recent case, in which they laid down the doctrine more vigorously than ever, and then refer back to these jewelers' cases, in which they said a good motive is immaterial; that the fundamental thing that is material is the fact that it is in restraint of trade—you will see that the Sherman law covers all that, even since the rule of reason was invoked. This single citation ought, I think, to appeal to lawyers. This is a decision by the Supreme Court in the Bathtub Trust case. I am afraid I am taking up too much of the time of the committee, but it is the only way I can handle it. I find the committee, perhaps, thinks I am taking up too much time.

The CHAIRMAN. No; we would like to hear that.

Mr. LEVY. This decision is as follows:

> The others it is not necessary to review or to quote from, except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form" or the escape of its prohibitions "by any indirection." (U. S. *v.* American Tobacco Co., 221 U. S., 106, 181.) Nor can they be evaded by good motives.

That is going very far.

Mr. CARLIN. What case are you citing from?

Mr. LEVY. I am citing from Standard Sanitary Manufacturing Co. *v.* United States.

Mr. CARLIN. That is the Bathtub case?

Mr. LEVY. That is the Bathtub case (206 U. S., p. 20), decided just about a year ago.

> The law has its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of the parties and, it may be, of some good results.

That was written after the rule of reason was invoked, and I say it leaves the law with teeth in it, to use the popular phrase.

Mr. NELSON. What did the Supreme Court intend to do by writing the rule of reason in it?

Mr. LEVY. The primary object in the Tobacco case, in which the Chief Justice laid down the rule of reason, was, as he himself states, to bring within the scope of the Sherman law many of the outlying elements of the combination which otherwise, by a strict construction of the statute, could not be brought into it. It is there stated that unless the statute be read in the light of reason many of the obnoxious features of the assailed combination could not be brought within the prohibitions of the Sherman law, but by looking at it in the light of reason, that would be done. My own view is that every statute on the statute books has to be looked at in the light of reason. All of these statutes, which I will not refer to—all conspicuous statutes—are looked at in the light of reason. And so here I insist upon the proposition that the effect of the rule of reason upon the Sherman law was not to emasculate, not to weaken, not to narrow, but to strengthen and to broaden that law.

Mr. NELSON. In these previous cases was not the question of unreasonableness directly at issue, and did not the courts hold that that was in question?

Mr. LEVY. I do not know what case you refer to where the question of unreasonableness was at issue, unless you mean the two traffic cases. As a matter of fact, the whole doctrine, as Mr. Carlin well knows—I think he said so to-day, if I remember—is all obiter. That is a curious thing about it. I lay down that proposition, that the whole discussion of unreasonableness and reasonableness is purely obiter dictum; wherever it came up it came up as obiter, in every single case, where it came before the courts for decision.

The CHAIRMAN. It was not necessary to have said anything about the rule of reason in the Standard Oil case or any of the rest.

Mr. LEVY. I will say this, as I said in the earlier part of this discussion, that the Chief Justice pointed out that many of the outlying elements of the Tobacco Trust would not have come within the prohibitions of the Sherman law except by invoking the rule of reason.

Mr. NELSON. Do you, in your printed argument, take that up in detail?

Mr. LEVY. Yes, sir.

Mr. NELSON. Then I will not ask you about it.

Mr. LEVY. We proceed from that to a detailed consideration of the pending bills.

Mr. MCCOY. I suggest that we take in right at this point your printed brief.

Mr. LEVY. If that is desired, I have two copies of it here.

(Same appears at end of witness's testimony.)

Mr. NELSON. There are a few questions I would like to ask you before you pass on to the next point.

First, what authority is there for the Attorney General consenting to such dissolutions as in the Tobacco and Oil cases?

Mr. LEVY. There were no consent decrees in the Tobacco and Oil cases.

Mr. NELSON. There was a refusal to bring the appeal, but how about these other cases?

Mr. LEVY. I will name those others in which that took place: The General Electric Co., the Eastman Kodak Co., and perhaps in the Telephone case and in the New Haven case. I have no personal knowledge except in the case in which I was of counsel—the Jewelers' case. In all these cases I think the Attorney General was well within his rights.

Mr. NELSON. What is his authority? Is it the general law?

Mr. LEVY. Let me illustrate briefly by just what was done in the Jewelers' case.

Last June the Department of Justice began a grand-jury inquiry in New York City of this situation in the jewelry industry. The defendants went to the Department of Justice and said: "Do not do that: we are law-abiding people; we are all responsible business houses." They said: "We will do whatever you like; we will stop these practices if you say they are wrong." The Government said: "We will suspend action and see if you are in earnest about it." They were satisfied that they were in earnest about it, and they had negotiations down here with the Department of Justice in Washington. The department said: "We will tell you what we want. You have got to discontinue this practice, that practice, and the other practice." They said: "Very good; we will do that." The Attorney General, in effect, said: "I will draw up a bill in equity, and if you will consent to a decree under that bill the matter is ended." That was done. I think that is within his rights. We could have resisted it if we disagreed with the department's view of the Sherman law.

Mr. NELSON. It gives him authority to determine, as a judge, to what extent they are violating or not violating the law.

Mr. LEVY. Not except with our approval.

Mr. CARLIN. This fact would always be true: After the bill was filed an answer admitting the allegations of the bill would be all that was necessary to bring about a decree without any court preceedings?

Mr. LEVY. Even there, Mr. Carlin, it is a fact that after that bill was filed—I have a copy of it here—I interposed an answer, and then to conform with my agreement, I withdrew the answer and consented to the decree.

Mr. CARLIN. Your answer denied the bill, did it not?

Mr. LEVY. Yes; in part. It was a formal answer in equity. But no harm was done, because we were there to protect our rights. Each association had its own counsel.

Mr. NELSON. The harm would be done to the country, would it not? You folks, of course, would look out for your interests.

Mr. LEVY. I can not see there in that case——

Mr. NELSON (interposing). I am not referring to that specific case.

Mr. LEVY. Yes, sir.

Mr. NELSON. But, generally, what do you say as to the policy of the Department of Justice or the Attorney General consenting to these "consent decrees"?

Mr. LEVY. If I understand the question aright, you mean lest in some future day an Attorney General, misusing his power, might throw away the rights of the people by making some improper bargain, as it were?

Mr. NELSON. And the effect of this decree as to violations that have been taking place without his knowledge.

Mr. LEVY. My answer to that is that such a power is vested in every executive officer, although he might, of course, misuse it. Certainly the Attorney General can do it in other kinds of suits.

Mr. CARLIN. How could he do otherwise, Mr. Levy? Take the case I spoke of. Suppose after filing the bill an answer is filed admitting the allegations of the bill; there would be nothing to do but take the decree.

Mr. LEVY. Pro confesso.

The CHAIRMAN. Under section 4 of the Sherman antitrust law there seems to be ample authority given to the Attorney General to do what he did do. It says:

The several circuit courts of the United States—

The circuit courts are now abolished and the district courts of the United States are substituted for them—

are hereby vested with the jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts under the direction of the Attorney General to institute proceedings in equity to prevent and restrain such violations.

Mr. LEVY. Of course, as I understand the question, Mr. Chairman, it goes beyond that. The question is whether it is safe to intrust him with such power after beginning such proceedings.

The CHAIRMAN. It goes on further and says:

Such proceedings may be had by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited.

This consent decree is "otherwise prohibiting it."

Mr. LEVY. But I still understand the question to go somewhat further than that; that is, is it safe, and ought there not to be some legislation taking away from him that power to enter into a bargain without suit?

Mr. NELSON. Take this illustration: You were appearing for the independent companies in the tobacco case?

Mr. LEVY. Yes, sir.

Mr. NELSON. There the Attorney General refused to take an appeal?

Mr. LEVY. Yes, sir.

Mr. NELSON. And you earnestly tried to get to the Supreme Court. Now, in a consent decree why could not the Attorney General give the right to come in there that way, and then compromise the case by agreeing to a settlement?

Mr. LEVY. And the argument was pushed further in the tobacco disintegration proceedings. It was there said that the Attorney

General not only had that right, but that he could have even discontinued the action.

I will say to you gentlemen, as lawyers, everyone of us has got that right. When we as lawyers bring a suit for Brown or Jones or Robinson, we have a right to discontinue it whenever we like, such is our control over the proceedings. Therefore you can not take that power from the Attorney General. If it is to be supposed that he would misuse or abuse the power by dishonest bargaining—and when I use that word I am speaking of some remote possibility—if he were to do such a thing it would be no more than any other dishonest attorney might do. I do not know how you are going to prevent it.

Mr. CARLIN. Is not this true, that whether the decree be by consent without proof, upon the mere filing of an answer, or whether it be after proof the Attorney General is the final judge of the character of the decree the Government should take, after he concludes his case, subject, of course, to the approval of the court?

Mr. LEVY. And possibly some supervision by Congress, perhaps; but with respect to this litigation——

Mr. CARLIN (interposing). Congress can not supervise each individual decree.

Mr. LEVY. It could not.

Mr. CARLIN. Therefore, practically speaking, the Attorney General, either in a litigated case or one that is not litigated is the man who is entrusted with the drafting of the decree.

Mr. LEVY. Necessarily, so far as the Government's rights are concerned.

Mr. NELSON. Right there, supposing that in this telephone suit other parties felt themselves seriously aggrieved, insisting that the Attorney General had compromised with a trust; would you not think some way should be devised by which an agrieved person would be able to file a bill and have that reviewed?

Mr. LEVY. There is no such bill before this committee, or any suggestion of that kind.

Mr. NELSON. I know, but we are not limited to the bill?

Mr. LEVY. So I understand.

Mr. NELSON. I want to know whether you would like some such remedy?

Mr. LEVY. I want to say to the committee that I strove strenuously to arrive at some such remedy in the Tobacco disintegration proceedings.

Mr. NELSON. You would like to have that in this bill?

Mr. LEVY. I would like to have done that in that case. Senator Cummins introduced a bill in the Senate giving the independents who joined in that suit the right to appeal, and also directing the Attorney General to appeal. The bill never became a law.

The CHAIRMAN. Did the bill pass the Senate?

Mr. LEVY. It did; but not the House.

Mr. CARLIN. I call your attention to the fact that there is now pending before the Commerce Committee a bill creating an interstate trade commission.

Mr. LEVY. Yes, sir; I have that in my hand now.

Mr. CARLIN. That bill does give to that commission the power to review and supervise a decree before it is entered by the court, but only in the event that the court approves it.

Mr. LEVY. And then only in an advisory way.

Mr. CARLIN. Of course it does not give them final and controlling power over the decree, but it gives them reviewing power to call to the attention of the court the character of decree which would be most helpful.

Mr. LEVY. No different than the Bureau of Corporations has today.

Mr. CARLIN. Oh, yes; the court has no power to refer a decree to the bureau.

Mr. LEVY. The Attorney General referred to it in the Tobacco case and got a report from the Bureau of Corporations on vital and essential parts of that decree and used it.

Mr. CARLIN. That was before a master?

Mr. LEVY. No, sir; that was before the full bench of the circuit court, while the dissolution plan was under consideration. I am going to read that in a moment.

The CHAIRMAN. Did the approval by the bureau embrace a plan of settlement in that case?

Mr. LEVY. It was an approval by one of the officers of the Bureau of Corporations whom the Attorney General called upon for a special investigation and report upon a part of the plan of settlement, as the chairman has called it. We call it a decree of dissolution. The terminology makes no difference.

Mr. NELSON. Are you familiar with the consent decree in the Telephone case?

Mr. LEVY. There has been none. I mean that there has been none announced. They have made certain recommendations that are going to be put in the decree, perhaps—I am not sure of that.

Mr. NELSON. Suppose that is the case?

Mr. LEVY. Yes, sir.

Mr. NELSON. Is it likely that the telephone combine has absolutely surrendered and is no longer violating in any way the Sherman antitrust law as to monopolies or otherwise?

Mr. LEVY. I will answer that in this way: I am informed that they have made concessions, have yielded their position, beyond that which a decree would have driven them to do. That is only hearsay, however.

Mr. NELSON. But would you say that they have now agreed to hereafter conform to the Sherman antitrust law?

Mr. LEVY. That is my understanding. Let me illustrate that by digressing for a moment and referring to the recent occurrence with regard to the Sugar Trust. No doubt all the members of the committee have read of the negotiations for the settlement of the suit against the Sugar Trust, which suit has been pending for a year or two back. They declared a willingness to conform to the wishes of the Government, but in the course of the negotiations, it is said, the Attorney General made certain demands with respect to the proposed dissolution of the Sugar Trust to which the Sugar Trust refused to accede. The result was that the negotiations were abandoned and the suit has been resumed. I cite that as showing that in these cases the department is asking for a full measure of enforcement of that law.

Mr. McCoy. Is not this about the fact with reference to that proposition, that some human being has finally got to decide whether the Government is getting all it is entitled to?

Mr. Levy. I see no escape from that.

Mr. McCoy. You can push it along to the trades commission, and if they do not seem to be doing all right; you can push it along to somebody else, and keep pushing it along, but after all some human interest has to protect the Government?

Mr. Levy. It devolves upon some person to assume that responsibility.

The Chairman. This bill would curtail the opportunity for corruption?

Mr. Nelson. How can you impeach a Government official for the mere misuse of discretion in a lawsuit of that kind?

The Chairman. I say corruption?

Mr. Levy. This is not a question of corruption.

Mr. McCoy. But the court has the final say; the Attorney General says, "This is our decree," but the court can differ with him.

Mr. Levy. The court will not do it.

Mr. McCoy. They can?

Mr. Levy. The court entered the jewelers' decree last week simply on motion of the district attorney, with my consent.

The Chairman. In the Union Pacific Railroad Co. case recently the court accepted the plan of the Attorney General, and, as I understand it, finally adopted it.

Mr. Levy. That was not a consent case, Mr. Chairman, it was litigated.

The Chairman. Yes; but the findings of the opinion—there was some sort of opinion or agreement drawn up by the Attorney General and the various attorneys in that case, was there not?

Mr. Levy. Yes, sir; that is right.

In the Tobacco case Judge Noyes said:

> I am largely governed by the views of the Attorney General, who stands here as the spokesman and representative of the Government.

Mr. Nelson. In case he had erred, what would be the fact as to any reparation or penalties as to that concern?

Mr. Levy. The fact is that in the Tobacco Trust case the Attorney General did err radically. And it is well to point to recent history shown by public statements that the present Attorney General is now setting to work to correct those errors. That is in connection with the Tobacco case; the only way to do it in other cases, apparently, if there is a way, is by legislation—directing an appeal, or directing the subsequent Attorney General to appeal, after the time has elapsed. In the Tobacco case that was the purpose of the Cummins bill which passed the Senate and was referred to this committee by the House. That is a different proposition. I confess at the moment I am hardly prepared to discuss it, but that does present an interesting question. As was said a while ago, responsibility must be reposed in some human being. If he misuses the power dishonestly or corruptly, he ought to be and often is punished.

Mr. Carlin. He is punished politically, is he not?

Mr. Levy. He is punished politically, but I dare say it would be a violation of his oath of office, and he would be subject to impeachment.

Mr. NELSON. He could not be impeached on a question of discretion?

Mr. LEVY. Oh, not at all. If it was a matter of discretion and it had been honestly exercised, that would be a different thing. It would have to be corrupt.

I will only say that in these recent consent cases there is no question but that the Department of Justice is asking for the fullest measure of what the Sherman law would give it.

In the Jewelers' case they first asked for a dissolution of the two great jewelry associations. It would have been a dreadful thing to break up these concerns and would have accomplished no good purpose. The department at first insisted upon a dissolution. After reflection they said, "No; we will waive that point."

They were not animated by any malice, nor were they bargaining away the rights of the people. I take it that this entire discussion relates to what might possibly arise in the future.

Before taking up specifically the pending bills now before your committee, I shall allude only in the briefest way to the fact that the Democratic national platform apparently confirms the view that the "rule of reason" constitutes judicial legislation whereby the word "unreasonable" has been written into the statute and the force and efficiency of the statute thereby weakened, thus making amendment necessary. The plank of the platform relating to this subject is as follows:

> We regret that the Sherman antitrust law has received a judicial construction depriving it of much of its efficacy, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretation.

This statement of the Democratic national platform asserts that the "rule of reason" in the Oil and Tobacco cases weakened the antitrust statute. I submit, however, that when the platform was written the true situation had not as yet been developed, for it was later that the circumstances arose which made it clear that the "rule of reason" had not weakened the Sherman law.

An interesting admission of this fact, and, if I may say so, a strong justification of the claim that the Democratic Party is absolved from observing this plank of its last national platform, is found in the fact that the New York Tribune, a recognized organ of the Republican Party, in an issue of recent date (Jan. 15, 1914), said:

> The Democratic platform, to carry out which the antitrust laws are being drafted, was written before the present situation arose.

Inasmuch as this statement is made by a leading Republican organ, it indicates that no Republican opposition can be based upon the contention that the Democratic Party is compelled to carry out this particular requirement of its platform, because, as the Tribune correctly says, that plank in the platform was written before the present situation arose. The "present situation" which is referred to has been brought about by the fact that since the platform was written in 1912 there have been numerous decisions of the Supreme Court showing that the "rule of reason" has not weakened the Sherman law, and, in addition, numerous important corporations have voluntarily acquiesced in the strict and drastic interpretation placed upon

the Sherman law by the Supreme Court and the Department of Justice, thus showing that no uncertainty exists in this respect, as viewed from the standpoint of those corporations, and also showing that the "rule of reason" has not in fact relaxed or mitigated the drastic character of the Sherman law.

In making the statement that the requirements of the Democratic national platform ought not any longer to be deemed to be controlling by reason of the changed situation which has been pointed out, I limit my remarks in this respect entirely to that part of the platform which has been referred to. As I shall hereafter point out, the changed situation which has been brought about since July, 1912, has not in any way affected the recommendations of the platform with respect to the subjects of holding companies, interlocking directorates, and the like. I will mention this subject more fully a little later.

I will now take up a detailed consideration of the four bills now under consideration before your committee and submit my comments thereon.

Mr. CARLIN. With reference to the bills under discussion, the interstate trade commission bill is not before this committee.

Mr. LEVY. Shall I discuss that?

Mr. CARLIN. No; that is before the Commerce Committee.

The CHAIRMAN. The bill you have before you now is a bill to supplement an act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. That is the bill you have before you.

Mr. LEVY. Yes.

The CHAIRMAN. There are three of these bills.

Mr. LEVY. Yes.

The CHAIRMAN. Take up that one first.

Mr. LEVY. Both as to phraseology and as to substance?

Mr. CARLIN. As to substance; the phraseology is only tentative.

Mr. LEVY. Yes. Now, as to substance——

Mr. CARLIN (interposing). Or as to phraseology either.

Mr. LEVY. They are intermingled, Mr. Carlin.

Mr. CARLIN. All right.

Mr. LEVY. The first part of section 9 is criticizable, in my opinion, in respect of the words in the first line of page 2, namely, "for any person." If you carry that subject down to line 5 and take up the verb "injure" you have it reading: "It shall be deemed an attempt to monopolize trade or commerce among the several States or with foreign nations or a part thereof for any person with the purpose or intent to thereby injure a competitor to discriminate in price," etc.

That goes way beyond the purpose of the Sherman law. That is not a combination at all.

Mr. CARLIN. That is supplemental, entirely, to the previous act?

Mr. LEVY. Does the committee contemplate that an act of a single person in endeavoring to injure his competitor should be made unlawful? That goes beyond the accepted doctrine of restraints of trade, Mr. Carlin. My language was not well chosen. I said "beyond the Sherman law"; I should have said "beyond the doctrine of restraints of trade."

Mr. FLOYD. That is proposed to supplement the Sherman law?

Mr. LEVY. Yes, sir.

Mr. FLOYD. Section 9. In section 8 of the Sherman law it is said that the word "persons" where used in the act shall relate to corporations?

The CHAIRMAN. Here is the exact language:

That the word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Mr. LEVY. I fully understand that, sir; but nevertheless it includes individual persons. It says that the word "person" shall include corporations, and it also includes an individual person. Is it the intention of the committee that the law governing restraints of trade shall be extended so that a natural person, as the law has it, shall be prohibited from discriminating in prices between different purchasers, even with the intent of injuring a competitor? That is the competition that is the very life of trade. The vice of it is when it is done by a combination. Of course, it is an injurious thing if the Standard Oil Co. sells lower in Texas and higher in Arkansas, dependent upon whether they wanted to crush out opposition in Texas and not in Arkansas. But that is a combination. But is it now to be said that one man can not do that as this bill proposes? The Sugar Trust decision in New York, in the One hundred and twenty-first New York Reports, expressly distinguished that. I mean the difference, in this respect, between what a corporation and an individual can lawfully do.

Mr. CARLIN. We are dissolving the corporation now. Suppose they go on and continue the same thing; we want to reach the evil, whether the evil is the result of a combination or otherwise.

Mr. LEVY. Even though represented by the act of an individual?

Mr. CARLIN. Of course if he does these things that are unlawful, whether he is a corporation or an individual would make no difference. That is what the bill would mean.

Mr. LEVY. To my mind—I have just noted it here—the result would be to prevent a single individual, without any element of combination or conspiracy being present, from discriminating in price for the purpose of building up his business. That would never do, if you will permit me to say so.

The CHAIRMAN. You would substitute "corporation or association or combination"?

Mr. LEVY. No, sir, Mr. Chairman; I would get into it appropriate language so as to make it applicable to combinations. I would get back into it the words "restraint of trade." Of course, you gentlemen will think that I am wedded to the present phraseology of the Sherman law, and I am largely. I would get it back into the broad present scope of the present Sherman law. Therefore, I will extend this criticism by the further criticism that everything sought to be covered by this supplemental bill is improper because——

Mr. CARLIN (interposing). Of course this bill goes beyond the Sherman law.

Mr. LEVY (continuing). I will say this, if it goes beyond it, it goes beyond it in respects that are not desirable, I mean as to those things that everybody will agree are innocuous and harmless; that as to those things that are noxious and harmful the Sherman law to-day covers every part of this bill, except the part about res judicata.

Of course, that is a different thing. That is, very probably, good legislation. But this part here is attempting to enlarge the doctrine of restraint of trade in a way that is going to be hurtful and is going to injure the Sherman law itself, because you have set up as section 9 of the Sherman law—as an addition to the Sherman law—a brand new doctrine, one never heard of before, with relation to restraints of trade.

If the fact is that upon the dissolution or breaking up of one of the great combinations one of the elements into which it is resolved shall be a single individual, and he carries with him the power which was held by the combination, and it is thought the individual should be checked, that is a different proposition, but one which experience shows does not happen.

The court of appeals in New York said in the Sugar-Trust case, in One hundred and twenty-first New York Reports, that we need not fear what one individual is going to do, we can take care of him. No individual is going to embark the necessary wealth in such a vast enterprise as the Standard Oil or the Sugar Trust.

So I say, again with deference, that that point would lead to injury and a hurtful result, more specially since everything in that section is now adequately covered by the Sherman law. That is to say, the main thing, discrimination as to price, is fully covered to-day. It came up in the tobacco case, in the Standard Oil case, and in all the others which I now recall.

Mr. CARLIN. Do you think, then, that there is anything in the present statute to regulate the sale of commodities at the same price in different communities?

Mr. LEVY. I say this—that there are plenty of cases that hold that it is an unlawful restraint of trade to do that if it be done as the result of combination or unlawful agreement, but not if it is done by an individual. But I say that the very thing you want to prohibit and prevent here is fully prohibited and prevented by the Sherman law as it stands to-day if you establish the fact that a combination is present, and I take it that that element is a sine qua non in the whole discussion. Of course, I may be wrong. It is news to me, I am frank to say, that the committee aims at an individual. In the wisdom of the committee that may be sound; but I do not agree with it. It is news to me to find that that is aimed at and contemplated, because all the books and experience say that that is not necessary.

I will pass on to the next, if the committee wishes.

The first proviso, on page 2, lines 13 to 18——

The CHAIRMAN. Line 6 is the first proviso.

Mr. LEVY. Yes; I was wrong. That is the third proviso. Lines 13 to 18—I say this with great deference, too—that is obscure, and its purpose and results are very uncertain and doubtful:

> That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers.

Mr. CARLIN. Except as to mining propositions. When it comes to mines, we have a different rule there.

Mr. LEVY. You are getting yourselves on a broad sea there, and that is why, in my argument earlier in the afternoon, I said that the Sherman law, in these previous decisions, is broad enough, and in cases of combinations nobody ever escaped from the Sherman law,

or the common law of England, that tried to do these things and who was prosecuted therefor.

Mr. CARLIN. Did the Sherman law ever require miners to sell their products to any responsible persons that applied to them?

Mr. LEVY. No, sir.

Mr. CARLIN. This bill does.

Mr. LEVY. That does not relate to the doctrine of restraints of trade. That is another proposition. In this again, Congress is embarking not only on a broad sea but a different sea. I, frankly, am not prepared to discuss it, but I will say that it is not a part of the Sherman law discussion.

I will pass on to the next.

Section 10, pages 2 and 3, lines 19 to 25, and so forth.

I contend, if that is analyzed and if it is aimed at a combination, which apparently it is not, it is already covered by the Sherman law; but if it is aimed at an individual, this section 10, it controverts a host of decisions which approve exclusive selling agencies if no element of combination in restraint of trade is present.

I cite as an illustration Knox hats and Dunlap hats. As I read that section, the results will be that if Dunlap or Knox or somebody else wishes to make a retail merchant his exclusive selling agent, it would be deemed unlawful. The bill reads:

> That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to make a sale of goods, wares, or merchandise or fix a price charged therefor, or discount from or rebate upon such price, on the condition or understanding that the purchaser thereof shall not deal in the goods, wares, or merchandise of a competitor or competitors.

I take it, and the law always has been, that, for example, Knox, the hatter, if he is an individual and not a combination, has that right and ought to have that right. Why should he not? What harm does it do? Why can not Knox, as an individual, say to the retailer, "I will give you my goods and you can sell them, providing you will be my exclusive selling agent, and will not sell the hats of my competitor, Dunlap; I do not want to help out his business by allowing him to put his hats up for sale alongside of mine." I say it is all right for an individual to do that. It was a different matter for a trust, like the Tobacco Co., to say to the jobber, "You can have our goods only on condition that you do not deal in the goods of any independent manufacturer." That was wrong, because they had gained a power there by combination which gave them an undue and unfair advantage over the individual competitor, and if left unchecked would have resulted, necessarily, in the crushing of all of those competitors. But this is different as to an individual.

Mr. FLOYD. You think this is right in the case of the Tobacco Trust, but it would be wrong as to Knox, because the Tobacco Trust is a combination.

Mr. LEVY. If Knox is an individual—that is, a natural person—I say that the law does not prohibit it and ought not to prohibit it, but if there is a Knox hat company, and it is a combination in restraint of trade, then the law ought to forbid that, and the Sherman law does forbid that. This amendment does nothing new except what might be economically hurtful, if it is aimed at an individual.

Mr. VOLSTEAD. Would not that apply to a corporation?

Mr. LEVY. It should apply to a corporation if the element of combination was present.

Mr. VOLSTEAD. Assume that the United States Steel Co. is not a combination; would it be proper to apply it in that case?

Mr. LEVY. If it did not have the element of unlawful combination present it ought not to be applied to it. Of course there my argument is being pushed to its extreme, and properly so, because there we would have a combination of vast power. Suppose some persons should organize a little grocery company—a corporation, but not an unlawful combination—it would simply be good business for it to discriminate in prices for special reasons, and it ought to have the right to do that, and the law does not forbid it. And it would be, I say, an unnecessarily hurtful thing if it did forbid it.

Mr. CARLIN. You seem to overlook one fact, namely, that you tie the hands of the merchant by keeping him from going into other lines of business by that contract.

Mr. LEVY. You mean the person who receives the goods?

Mr. CARLIN. The seller of the goods, the retail merchant, has his hands tied by that character of agreement.

Mr. LEVY. An exclusive selling agency is usually a privilege, if it does not emanate from a combination which forces it upon him.

Mr. CARLIN. Whether it emanates from a combination, a corporation, or a person, this bill bespeaks it as an evil; it says a contract of that sort shall be deemed, hereafter, in restraint of trade.

Mr. LEVY. If it is meant to reach an individual doing this thing, I would simply say that the courts hesitate—not on economic grounds, but on legal grounds—I would say that the law as it stands to-day covers all it should cover on that proposition, namely, combination.

In so far as it includes corporations that in themselves are combinations, the principle is sound, but that is already in the Sherman law.

Mr. CARLIN. If they are not in those combinations you think that ought not be prohibited?

Mr. LEVY. It ought not.

Mr. VOLSTEAD. In your judgment if it is a combination in restraint of trade, then this section does not add anything to the Sherman Act?

Mr. LEVY. It does not. Permit me to say one word on that. It would not only not add anything, but would tend to obscure it, because it might be that ingenious lawyers might interpret it to have in some way changed that law.

Mr. CARLIN. There is nothing in the Sherman law that prohibits that character of contract being made by anybody.

Mr. LEVY. I do not understand you.

Mr. CARLIN. I say there is nothing in the Sherman law that prohibits that thing prohibited in this section from being done.

Mr. LEVY. Oh, yes; there is.

Mr. CARLIN. Will you point it out?

(Mr. LEVY. I will point it out. Let me make the point clear. You say there is nothing in the Sherman law that prohibits a combination from doing that thing?

Mr. CARLIN. Oh, no; that prohibits this character of contracts being made which we prohibit in this section. There is something

in the Sherman law prohibiting combinations in restraint of trade, but we are prohibiting certain contracts from being made, whether made by a combination in the form of a trust, or whether made by an individual or a corporation. This provision, if we adopt it, means that that character of contract can not be made.

Mr. LEVY. You mean even on the part of a natural person?

Mr. CARLIN. Yes; by anybody.

Mr. LEVY. I fully concede that the Sherman law does not cover that phase of it. I say it covers everything but the prohibition against the natural person or individual.

Mr. MCCOY. Your point is that in the Standard Oil Co. case and in the Tobacco case this sort of practice indulged in by those companies was considered to be one of the things as showing that they were illegal?

Mr. LEVY. Yes, sir.

Mr. CARLIN. That was simply one of the elements of proof?

Mr. MCCOY. It was one of the elements of proof, and therefore it was not necessary to put it in here as one of the circumstances, because it is already one of the things that will be taken into consideration.

Mr. LEVY. Precisely right, unless the committee intends to enlarge that power and prohibit that practice on the part of individuals.

Mr. CARLIN. Or on the part of the corporations.

Mr. LEVY. Not only that—pardon me—if you mean to bring into that that natural persons can not do this thing, this act is necessary.

Mr. CARLIN. Suppose you meant to bring in a corporation that was not in the form of a trust?

Mr. LEVY. Yes, sir; it would undoubtedly do that.

Mr. CARLIN. So that it goes beyond an individual?

Mr. LEVY. Yes, sir; I take it that you mean a corporation of the kind I have instanced, namely, a corporation composed of different members of a family, or something of that sort; that that is not a corporation in the form of a trust; it is not a combination.

Mr. CARLIN. There are thousands of corporations that are not combinations in the form of trusts.

Mr. LEVY. Yes, sir.

Mr. CARLIN. Large ones as well as small ones?

Mr. LEVY. Yes, sir.

Mr. CARLIN. Now, then, this would apply to them?

Mr. FLOYD. Now, then, Mr. Levy, I want to ask you a question. This provision relates to section 2 of the Sherman Act. Section 2 reads:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Now, as I understand that prohibition, it is against individual persons.

Mr. LEVY. Your point is that this new section would make that apply to individuals?

Mr. FLOYD. I am speaking of the old section.

Mr. LEVY. Oh, no.

Mr. FLOYD. The section reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize" would be a violation of section 2 of the Sherman Act, for some individual with sufficient money to monopolize or attempt to monopolize any line of industry.

Mr. LEVY. Not if he did the things you name in this section 10; that would not be an attempt to monopolize.

Mr. FLOYD. It would not be? Suppose a man had enough money as an individual to buy individually and monopolize a certain line of industry, would he not be guilty of a violation of the law under section 2 of the Sherman Act?

Mr. LEVY. On the contrary, the decisions say exactly the reverse. In the One hundred and twenty-first New York, in the sugar-refining case, the court says the exact opposite; it says that an individual may do these things and not be guilty of a restraint of trade.

Mr. FLOYD. Construing the Sherman law?

Mr. LEVY. No; construing the common law.

Mr. FLOYD. Construing the common law; but I am asking you about this language: "Every person who shall monopolize, or attempt to monopolize," shall be guilty, or "who shall combine or conspire with any other person or persons." That is a different state of facts.

Mr. LEVY. That does not include, sir, the case of a natural person "fixing a price," or the conditions named in this new section 10. That is my answer.

Mr. CARLIN. You think we go too far?

Mr. LEVY. Yes, sir. That is my contention.

I now proceed to section 11. Section 11 says: "That nothing contained in section 9 or section 10 hereof shall be taken or held to limit or in any way curtail the meaning and effect of the provisions of section 2 of this act."

The question would arise, Is it to curtail the meaning and effect of the provisions of section 1 of this act? That is not a very serious criticism, but it is worth pointing out, and perhaps I had better pass on. It is not needful for me to discuss that. I do not urge any of these things controversially, but by way of fair criticism.

Mr. CARLIN. I understand.

Mr. LEVY. In section 12 there is something I think needs more consideration. I think in general it is useful legislation, but it presents difficulties.

Now, as to the language of it. I do not know whether I ought to take up the time of the committee as to mere phraseology, but the phraseology is defective.

The CHAIRMAN. We will be glad to hear you on it.

Mr. LEVY. Shall I speak about the phraseology?

The CHAIRMAN. We will be very glad to hear you.

Mr. LEVY. It now reads, beginning in line 17: "The existence of such illegal contracts"—

Now, I am going to complete the sentence and leave out other words. I will repeat:

"The existence of such illegal contracts shall (line 20) constitute (line 21) conclusive evidence of the same facts."

It seems to me that the sentence reads wrong. The sentence ought to be, "A judgment obtained in that action," etc. I will read it again in that form:

"That a judgment obtained in such a suit shall constitute the conclusive evidence."

I also think the latter part should read: "It shall constitute res judicata."

The phraseology, I think, should be changed. In a practical sense, I think there is some danger in that provision. I have in mind that a judgment of that sort would be entered in a contested case and just before the expiration of the enlarged period of limitation a private suit would be started and that judgment be invoked as res judicata. The conditions may then be entirely different. For instance, the Elecetric Co. case—I instance that because it is a very representative case of a successful commercial enterprise which was enjoined and declared an illegal combination a few years ago—a dealer suing it for damages on facts happening yesterday or last week, and invoking the decision as res judicata, which was decided on facts which arose years ago and which may have been abandoned. To my mind that suggests dangerous possibilities, which I think could be avoided by changing the whole scheme and giving private individuals a right to intervene. That is to say, that during the pendency of that action let a private party come in and intervene with the right to prove his damages and recover judgment for such damages, conditioned on the judgment in the case going against the defendant to the effect that it is an unlawful combination.

Mr. CARLIN. Then you would require him to suspend his action pending the outcome of the Government suit?

Mr. LEVY. Yes.

Mr. CARLIN. Would you do that here?

Mr. LEVY. You wait until the Government suit is disposed of.

Mr. CARLIN. We just require him to wait until the Government suit is concluded, or permit him to do so if he wants to do so. His rights under the Sherman law still exist; he can sue, if he wants to.

Mr. LEVY. Suppose he brings his suit to-day for things that happened years ago, and invokes, as res judicata, a judgment entered three years ago; then the defendants come into court and show it is no longer an unlawful combination; would it be fair and just to that defendant to say, "You are conclusively bound by that judgment of three years ago, although we know you are reformed," and the injury done to that man was the result of proper competition?

Mr. CARLIN. You would not take away from him his rights under the Sherman law, would you? Would you deprive the individual of the rights he has under the Sherman law?

Mr. LEVY. No.

Mr. CARLIN. He has a right to sue for damages?

Mr. MCCOY. Your point is that his rights have accrued subsequent to the doing of the wrongful acts?

Mr. LEVY. Correct.

Mr. MCCOY. And that the rights which he thinks he has are based entirely on a new state of facts, and if he has a remedy under the Sherman law he would still have it and would not have the benefit of the decree based upon its previous acts?

Mr. LEVY. Exactly.

Mr. CARLIN. Your contention is he ought not to have the benefit of it?

Mr. LEVY. I say it is a dangerous thing.

Mr. CARLIN. He does have it, and you say he ought not to have it?

Mr. LEVY. If he is to have it he ought to have the right to intervene, to come into the main action, and stand by until the Government gets through, and take his damages if the Government wins.

Mr. FLOYD. If you will pardon a suggestion from me right there, it never occurred to me that anyone whose cause of action originated after the decree would have that right. This is intended to benefit those whose cause of action occurs previous to the rendition of the decree and covers the period that was involved in litigation previous to the rendition of the decree; and for that reason we should extend the statute of limitations in order that the party may wait. But this is drafted with the idea that the cause of action originated from practices of the corporation previous to the time that the decree was obtained.

Mr. LEVY. The bill does not say so.

Mr. CARLIN. It does if you will read section 13 in connection with it. You see we suspend there the statute of limitations.

Mr. LEVY. Mr. Carlin, that does not limit the right of the plaintiff in the later suit, because you enlarge the statute of limitations.

Mr. FLOYD. That would be implied.

Mr. LEVY. That would be a doubtful implication, to my mind.

Mr. FLOYD. But it never occurred to me, as a lawyer, that anybody whose cause of action arose after the rendition of this suit could rely upon a decree rendered to show what is still an unlawful combination or practice.

Mr. CARLIN. Do you think that we ought to say that that section only applies to causes of action which arose prior to the decree?

Mr. LEVY. Yes, sir.

Mr. FLOYD. If you will pardon me, it says that in these express terms, on page 4, lines 7 and 8. It says:

> And who at the time or previous to the institution of any such suit by the United States as aforesaid has a cause of action under section 7 of said act, of under section 13 of this act, against any defendent in a suit wherein a decree or judgment has been obtained as aforesaid.

Mr. LEVY. No, sir. Pardon me. If you will read the whole of that sentence I do not think it refers back at all. The whole of that sentence is this:

> In all cases where any person who shall have been injured in his business or property by any person or corporation by reason of anything forbidden or declared to be unlawful under the provisions of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and who at the time or previous to the institution of any such suit by the United States aforesaid, has a cause of action under section 7 of said act, or under section 13 of this act, against any defendant in a suit wherein a decree or judgment has been obtained as aforesaid, the statutes of limitation shall be enlarged.

That does not retroact. That does not correct the point I have mentioned with regard to the previous sentence. That merely enlarges the statute of limitations as to any occurrences prior to the beginning of the suit. The same words ought to be used in the previous sentence.

Of course my point is plain. I do not know whether I ought to amplify it. I repeat, that in my judgment that section is open to criticism.

Mr. FLOYD. Let me ask you further on that; you say it does not apply to the previous occurrences?

Mr. LEVY. I do not think so.

Mr. FLOYD. If a party has a cause of action previous to the suit or at the time of the commencement of the suit and he was not excepted from the provisions, why, then, you say he could not get the advantage of this decree if it were rendered, beyond the period of limitations.

Mr. LEVY. Oh, he is not excepted from it; I do not claim that.

Mr. CARLIN. Then another fact is it must be between the same parties. If a decree is entered and dissolution takes place, different parties are then operating and he would not have the same parties in litigation; it would be a suit as between different parties entirely.

Mr. LEVY. He could reach them all.

Mr. CARLIN. We only give him the benefit of this matter from the suit as between the same parties.

Mr. LEVY. I think that it does not say so.

Mr. CARLIN. Therefore, your suggestion creates an impossibility, because it involves different parties.

Mr. LEVY. No; even if it is the same party; take again the Kodak case——

Mr. CARLIN (interposing). I am assuming that the decree is one of dissolution.

Mr. LEVY. The case against the Electric Co. was a mere matter of injunction; the case against the Jewelers Associations was not a dissolution, nor the case against the Electric Co.; it was only an injunction. The Du Pont Powder Co., I am not sure about—I think that was a dissolution. The subject is not very clear, but I think intervention would be the best course.

The CHAIRMAN. How far did the injunction relieve in the Kodak case?

Mr. LEVY. I can answer better in the Electric case.

The CHAIRMAN. How far did it go?

Mr. LEVY. Certain practices were enjoined.

The CHAIRMAN. They enjoined the restraint of trade?

Mr. LEVY. Yes, sir; it was a mere injunction, as I recall it.

Mr. CARLIN. Refer to lines 19 and 20 on page 3:

> Shall, to the full extent to which such judgment or decree would constitute in any other proceeding an estoppel as between the Government and such person.

That is what that means when the parties are the same.

Mr. LEVY. I say all of them. They are the same.

Mr. CARLIN. Then you admit, so far as the dissolution is concerned, there is nothing in your point with reference to dissolution?

Mr. LEVY. It is different, Mr. Carlin. That is right. I do not say the objection is cured, but it is a different situation.

Mr. CARLIN. You say you admit it, so far as that is concerned?

Mr. LEVY. Probably.

Mr. MCCOY. I do not understand that to be the meaning. Suppose the Government sues the Standard Oil Co.; to the extent that judg-

ment would be res judicata against the Standard Oil Co. it may be used as evidence against somebody else?

Mr. LEVY. By somebody else.

Mr. MCCOY. Or by somebody else. Now, it makes no difference if somebody else is a different body from the Government. It says "to the same extent." In other words, to the extent that it does create an estoppel against the Standard Oil Co. and the Government in that action it can be used; in other words, as to those matters which are res judicata.

Mr. LEVY. I think Mr. Carlin's point is this——

Mr. CARLIN (interposing). I make no such contention as Mr. McCoy does.

Mr. MCCOY. Let us see to what extent the judgment is res judicata. It is res judicata as to those things given in evidence on material points. Is that so?

Mr. LEVY. As to those things which were litigated or should have been litigated and as between the same parties.

Mr. MCCOY. As between those parties?

Mr. LEVY. As between the parties to the suit. But you gentlemen are going further.

Mr. MCCOY. I am arguing on your side of the proposition. What I want to say is this: That lines 20 and 21 here mean that a judgment is evidence of certain facts between the parties to the suit. Now, what this means, as I understood it when I read it, was to the same extent it is evidence in a suit between different parties. Otherwise the section does not mean anything.

Mr. LEVY. That is correct.

Mr. MCCOY. Because we are endeavoring to give the benefit of a finding in a suit by Smith against Jones to Brown in his suit against Jones.

Mr. LEVY. As I take it, Mr. Carlin's point, if you will permit me to state it, is that where the Government had sued A and gotten a judgment and thereafter X, a private person, sues the defendant A and seeks to make the judgment res judicata, Mr. Carlin's point is that in a dissolution case A will no longer exist and it will not be applicable to such a case.

Mr. MCCOY. Now you are coming to an entirely different point. A corporation never can so dissolve that you can not have a remedy against it for a wrong.

Mr. LEVY. I have had that in mind, too. Even though you dissolve a corporation the remedy against it will survive.

Mr. MCCOY. Certainly. The Government can not wipe out a corporation and thereby wipe out the rights that people have against the corporation.

Mr. CARLIN. Suppose you destroy the assets?

Mr. MCCOY. That is a practical consideration, but as a legal consideration a third person can always proceed against a corporation; he still has his cause of action.

Mr. CARLIN. But he could not use his judgment.

Mr. LEVY. I will point out a further objection on page 4, line 1, namely, these two words, "or involving."

A little reflection would show that is dangerous phrase, I should think. I doubt whether it is wise that a judgment should be res judicata in other proceedings brought under the provisions of the

Sherman law, but you go even further and say, "In any other proceeding involving the provisions of this act." It is pretty hard to say how far that may go. Again I have no specific danger in mind, but I do think that is very dangerous.

Mr. CARLIN. You say there are a number of new provisions here, and the act specifically referred to would not be sufficient to cover the newer provisions which we are adding unless we do that.

Mr. LEVY. My objection is to more than simply the words "or involving;" it is too vague and indefinite for practical purposes. The Sherman law might come in merely collaterally, and it would even then be res judicata under this bill.

In line 8, page 4, the word "of" is omitted. I do not know whether you want criticisms like that or not. In line 12 the word "obtained" should be "rendered."

At the end of that paragraph I have got here "How about appeal?" You have enlarged the time and provided that the statute of limitations applicable to such cases shall be suspended during the pendency of such suit and shall not again become operative until after the date of the final decree or judgment in such cause.

That is a new provision in the law. That has not often been done. I do not know that it has ever been done. I offer the suggestion, How long would it be suspended in case of an appeal?

Mr. CARLIN. It does not affect that at all.

Mr. MCCOY. It simply enables the private defendants to go on and appeal as soon as the Government got judgment.

Mr. LEVY. That is right. He would wear out the statute of limitations if you put that in there.

Mr. FLOYD. His judgment would come after he had used this evidence some time, and the appeal in his case would be the same.

Mr. LEVY. Would you not want the statute of limitations suspended until the final judgment is passed upon on appeal, if an appeal has been taken? In other words, would not you want the words "final judgment" to be used in a colloquial or lay sense; that is, the final determination of that suit?

Mr. CARLIN. I think that is the intention of it.

Mr. LEVY. In our New York decisions the final judgment would be the judgment of the court of appeals. You would not have it extended during the time of the appeal from that judgment?

Mr. CARLIN. Otherwise the benefits of the section would be useless.

Mr. LEVY. Your language does not make that so.

Mr. CARLIN. That is the effect of it. If there happens to be an appeal in these cases it involves the decree itself.

Mr. FLOYD. It says "until after the date of the final decree or judgment in such case"—line 16—"shall be suspended during the pendency of such suit and shall not again become operative until after the date of the final decree or judgment in such court."

Mr. CARLIN. You could not give the man the benefit of it otherwise. There must be a finality. The decree must be final if it is worth anything to him at all.

Mr. LEVY. What is the intention of it—that the "final judgment" here means judgment entered on the appeal or judgment entered in the court below?

Mr. FLOYD. Final judgment; whatever is the final judgment. Until it is appealed from the judgment of the lower court would be the

final judgment. If it is appealed from later in the higher court, it would be the judgment in the higher court.

Mr. LEVY. I offer this suggestion: Under our procedure in the State of New York the question would arise whether that did not mean final decree in the court below.

Mr. MCCOY. I do not think so. For instance, in this case, a man, after his complaint is dismissed in New York, has still a year to bring another action. Now, then, suppose he appeals from the dismissal and goes to the appellate division, and goes to the court of appeals, and the judgment dismissing the complaint is affirmed, they have held that he then has a year within which to begin another action.

Mr. CARLIN. There is no final decree in the court below until that appeal is settled, or else it becomes final where there is a failure to take appeal.

Mr. LEVY. Let me remind you that there is both an interlocutory decree and a final decree of a court of equity. The latter is a final decree, although it is a decree of the lower court. I merely offer the suggestion that this provision should apply after the right of appeal has been exhausted, and there be a real finality to the proceeding.

Mr. MCCOY. Here is what would settle that, it seems to me, Mr. Levy: In line 12 it says, "The statutes of limitations applicable to such cases shall be suspended during the pendency of such suit."

A suit is pending as long as the right of appeal remains open.

Mr. LEVY. That may be. I think there is something in that.

Mr. MCCOY. Even though the complaint may have been dismissed.

Mr. LEVY. That may be; though it would still leave open the question whether "final decree" was used as applying to the degree of the court below or the decree entered after an appeal.

With respect to section 13, I would say broadly now, looking at it frankly but with a somewhat critical eye, for the committee wishes me to give it the benefit of critical suggestions and not fault finding suggestions, that that is rather dangerous, as giving power to individuals which could be readily misused; for certainly within the last few years the Department of Justice has stood ready enough and willing enough to set the powerful machinery of the Department of Justice in motion, as was evidenced in the jewelers' case.

Mr. CARLIN. The criticism we have had with reference to that section is that it does not go far enough.

Mr. LEVY. Not giving the individual sufficient rights?

Mr. CARLIN. That is to say, it has been contended by some that we ought to give the individual the same right to sue for an injunction that the Government enjoys.

Mr. LEVY. I do not know whether you gentlemen are familiar in your practice with the "strike" suits that are often brought in New York by private parties.

Mr. CARLIN. We have attempted to reach that by requiring a bond as a preliminary to injunctive relief.

Mr. LEVY. Mr. McCoy knows recently in New York there was a very severe stricture by the Supreme Court against a person in Wall Street for beginning such a strike suit.

Mr. CARLIN. That is a thing we want to dwell upon, because I think that is what was in the mind of the committee in drafting this

ı, that if a suit was filed for injunction a temporary restraining could be had in order that no damage should come pending suit.

LEVY. That is true.

CARLIN. It is contended that if there was immediate necessity e granting of a restraining order, and it could be shown by the › the satisfaction of the court that it ought to be granted, the ought to have the power to grant it; but in that case he shall e a bond of the party.

LEVY. Under our practice in New York we have to give a bond s. If the bond was made big enough I would perhaps with- the objection and say it is all right.

CARLIN. Of course we could not say in the statute just how the bond should be in each case. That depends on each indi- ıı a case, and we have left it to the courts.

LEVY. If that discretion is properly exercised by the court it would perhaps furnish a practical correction and perhaps it would be all right, although I am frank to say that I wonder at Mr. Carlin's statement that the criticism has been made that the power here sought to be given is not broad enough; because, based on my own experience, I do not know where injury has happened in this respect from the law in its present state.

Mr. CARLIN. The suggestion has been made to the committee that we ought to give to the individual power not only to sue for dissolution, but he should have the right to implead the United States in his suit.

Mr. LEVY. In this administration notably, even more than in preceding administrations, the Government has stood ready in proper cases to put at the service of individuals the machinery of the Department of Justice under the Sherman law to prevent such things.

Mr. CARLIN. Then you would not favor giving the individual the right to bring a dissolution suit and implead the Government in that suit?

Mr. LEVY. I certainly would not. I think it entirely unnecessary.

Mr. CARLIN. Nor would you give him the right to enjoin or restrain a man from interfering with his business?

Mr. LEVY. Not under the Sherman law, because it is unnecessary.

Mr. CARLIN. Assuming it is unnecessary, what is your objection to giving the individual that right if a case arises in which the authorities would not act?

Mr. LEVY. I would summarize my objection by citing the case of "strike" suits. I use that phrase in the interest of brevity.

Mr. CARLIN. Under that provision would that character of suits be possible, where there is a bond required?

Mr. LEVY. If a man sues a great combination like the Sugar Trust, no judge could exact from him a sufficient bond to cover the damages that might result from such a suit. The bond would have to be $25,000,000, or some such figure, and no individual would be able to furnish a bond for that sum of money.

Mr. CARLIN. The bond would not be exacted unless an immediate restraining order would be asked.

Mr. LEVY. I realize that.

Mr. CARLIN. There is no bond unless he goes on with his suit.

Mr. LEVY. Suppose he asks for a temporary restraining order, the court says, "You must give a bond." He says, "How much?" The court says, "This company is worth $25,000,000; if you stop it from doing business you will do it damage to the extent, say, of $5,000,000; so you must give a bond for $5,000,000." He can not do it. On the other hand, if the court says, "Give a bond for $10,000," which a man could do, it would be no protection to the defendant. The court could not exact a sufficient bond, because it would necessarily be too big; no individual could give a bond big enough to meet the exigencies of such a situation.

Mr. MCCOY. Your objection would lie against ever giving an individual a right to in any manner get an injunction?

Mr. LEVY. Yes, sir; I think so, because it would be both unnecessary and dangerous.

Mr. MCCOY. But you do not object to granting injunctions pendente lite, on giving proper bond—I mean in the average case?

Mr. LEVY. No.

Mr. MCCOY. Then, I can not see why there should be any difference in a case of this kind.

Mr. LEVY. Because these usually involve such vast sums of money, it would encourage dishonest people. It would be all right in the hands of honest persons, particularly if it were needed. But the point I want to emphasize is that I can not see why it is needed in cases under the Sherman law.

Mr. CARLIN. In order to have a temporary injunction he would have to show that there was threatened loss or damage, and that it is immediate, and that the danger of irreparable loss or damage is immediate.

Mr. LEVY. That is right.

Mr. CARLIN. He would first have to make that showing?

Mr. LEVY. Yes, sir.

Mr. CARLIN. If he made that showing, he would not have the character of suit you describe; he would have a bona fide suit.

Mr. FLOYD. Do you know of the suit where Mr. Earle, receiver for the Realty Trust Co.——

Mr. LEVY (interposing). Of Philadelphia?

Mr. FLOYD (continuing). Went into court and finally got a large judgment for damages?

Mr. LEVY. Yes, sir.

Mr. FLOYD. I have no doubt that Mr. Earle would have liked to have had the power to go in and enjoin them from committing this injury. He subsequently was awarded damages.

Mr. LEVY. I am familiar with that case, and the illustration is, I admit, a good one against my own position, because in that case Mr. Earle, receiver for the Realty Trust Co., sought to get the Department of Justice under the last administration to bring the suit, and they would not do it. Later on he brought a private suit for treble damages under the Sherman law.

Mr. FLOYD. And got $2,500,000?

Mr. LEVY. It was settled privately, I believe, for $2,500,000.

Mr. FLOYD. In that case the individual had the right to go ahead with his suit. I think that is one of the best things of the bill.

Mr. LEVY. The suit was under section 7 of the law as it now stands. The case instanced by Mr. Floyd is a notable but unusual illustration, because there the Department of Justice expressly refused to move against the Sugar Trust.

Mr. FLOYD. Mr. Levy, under section 7 of the Sherman Act a party is given the right to recover damages.

Mr. LEVY. Yes, sir; treble damages.

Mr. FLOYD. For wrongful acts committed by any of these illegal combinations against him?

Mr. LEVY. Yes, sir.

Mr. FLOYD. It is the intention of the provision to give him a right to prevent the committing of that damage and not have to wait until they have injured him and then try to recover damages.

Mr. LEVY. Theoretically that would be an advantage, but not practically.

Mr. FLOYD. That is the purpose of it, and if there are cases, and I can conceive that there might be, in which the Government would not use this great authority, we ought to give the individual, if he sees proper, the right to enjoin them from interfering with his business. It would not involve the whole power of the Standard Oil Co.; it would only involve districts in so far as it was interfering with their particular business is concerned.

Mr. LEVY. Mr. McCoy's illustration makes me waver in my view, but I am bound to say that the case he cites is the only one I have heard of where the right could have been usefully employed by individuals. I know of no others. I know of a case in North Carolina, in a suit for treble damages, where it might have been used. But both of those suits were begun after the Government won its suit.

Mr. CARLIN. Do you think that the right of the individual to injunction in common law was abridged by the Sherman law?

Mr. LEVY. Was abridged?

Mr. CARLIN. Yes.

Mr. LEVY. Well, he did not have a right at common law. I will change that, that the Sherman law as framed gave no such rights.

Mr. CARLIN. Except to the Attorney General?

Mr. LEVY. Except to the Attorney General.

Mr. CARLIN. Is it contended, having given no one else the right except the Attorney General, that it is prohibitive to all others having it?

Mr. LEVY. I rather think so.

Mr. CARLIN. Is that your view of it?

Mr. LEVY. I should think so.

Mr. MCCOY. I do not see why.

Mr. LEVY. You mean that the absence of it in the Sherman law would still leave it in the power of the individual to sue out an injunction?

Mr. MCCOY. If he had it before he should have it now. In other words, I think the teeth of the Sherman law was the criminal provision. After they had forbidden these acts they could not have gone further and given the Government the right exclusively to enjoin, because they had that right anyhow.

Mr. LEVY. No; because there is no common law in the United States.

Mr. McCoy. Well, I do not agree with you on that.

Mr. Levy. Not so far as crimes are concerned, anyway.

Mr. McCoy. Not so far as crimes are concerned, but I say that is the teeth of the Sherman Act. Of course there is no common-law crime in the United States, and they wanted to make these things crimes, and then they went further and did the other things; but I can not see why any right of the individuals to an injunction against these combinations was taken away by the Sherman Act simply because the law gave the Government the right to enjoin them.

Mr. Levy. I confess I have not looked up the point. I think there is force in your point, Mr. McCoy. You mean based upon the fundamental principles of the common law, if under the common law an individual injured my business I could come into court and make him stop that?

Mr. McCoy. I say that if before the Sherman law was passed he had that right, it was not taken away from him by the Sherman law because the Government was given the right by the Sherman law.

Mr. Levy. That is perfectly true, if the right existed previously.

Mr. McCoy. If it did exist, and it did in some cases, because it was used.

Mr. Levy. That may well be.

Shall I pass to the next bill?

Mr. Carlin. Suppose you skip the definitions bill.

Mr. Levy. Only with the statement, Mr. Carlin, that I believe the point I made previously applies forcibly to that.

Mr. Carlin. What is that?

Mr. Levy. Let me just say this in relation to this, that I, as a lawyer, speaking scientifically, am unable to discover why it was that the authors of the bill limited these definitions to these four things. They seem to have picked out these four conspicuous restraints of trade. Why did they limit this to these four, especially since the four are now, in the fullest sense of the word, covered by the Sherman law?

Mr. Carlin. Do you think that holding companies are likewise covered by the Sherman law?

Mr. Levy. If they use their power to restrain trade, but not otherwise; because no doubt in your practice you must be counsel for some company that owns the stock of another company where they are transacting everyday business and do not attempt to restrain trade.

Mr. Carlin. There are some holding companies that are not in restraint of trade.

Mr. Levy. That is what I say.

Mr. Carlin. Is it not your opinion that the Northern Securities case settles the law as to holding companies?

Mr. Levy. It said that a holding company could be in and of itself a combination in restraint of trade. It did say that; that is right.

Mr. McCoy. I want to ask you something about the bill that says:

That the words "every contract" (line 9) shall be deemed to include any agreement (line 17), to make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves.

Suppose a man was engaged in the hat business, to take your illustration, individually, and formed a partnership.

Mr. LEVY. This would prohibit it. I have written in the margin, Mr. Carlin, with great deference, "Destroys all contracts." I think it would.

Mr. CARLIN. What line is that?

Mr. LEVY. Paragraph 4, page 2, "Trade relations bill."

Mr. CARLIN. Do you practice law in New Jersey?

Mr. LEVY. No, sir.

Mr. CARLIN. Have you had occasion to read "The Seven Sisters"?

Mr. LEVY. I have read them.

Mr. CARLIN. Do you recognize any similarity between those?

Mr. LEVY. I think I do. To proceed, in line 18, page 2, the language is certainly wrong. The word "they" is wrong. There is something wrong about it. It does not read right. The subject of that sentence does not harmonize with the word "they." I do not know what it is at the moment, but it does not read right.

Mr. CARLIN. I will explain what I understand it to mean.

Mr. LEVY. I understand it.

Mr. CARLIN. It relates back to two or more persons.

Mr. LEVY. The sense is plain, but as a matter of grammar and correct phraseology the word is wrong.

Mr. CARLIN. What would you put there?

Mr. LEVY. I would substitute for the word "they" such corporations, firms, or persons."

Mr. MCCOY. Would you not say "by which it is undertaken directly or indirectly to restrain trade"?

Mr. LEVY. I think if you will make it say what it means, "corporations, firms, or persons," it would be right, except that the political economy of that provision is most unwise.

Mr. CARLIN. You do not approve of that?

Mr. LEVY. No; I do not approve of that.

Mr. CARLIN. Then you think that that definition does mean something?

Mr. LEVY. I say, Mr. Carlin, as far as it means anything, it goes beyond the Sherman law in a way that this committee, I make bold to say, does not mean it should go; that as far as this committee wants it to go to the Sherman law amply covers it, and you can get many citations of authority to support that statement.

Mr. CARLIN. Have you any additional paragraphs you think ought to be added to these definitions?

Mr. LEVY. If I wished to make such definitions exhaustive, I would have to reproduce every decision that has been written since the early ancient history of the common law on the subject of restraints of trade. In fact, it is impossible to give any specific definitions of what shall constitute restraints of trade, just as the courts, to use a trite illustration, have always found it impossible to give definitions of fraud.

One of the best presentations illustrating this point is contained in the statement made by Senator Pomerene, of Ohio, in conjunction with a report submitted to the United States Senate by the Committee on Interstate Commerce, of which Senator Pomerene was a member. This report was submitted to the Senate on February 26, 1913, pursuant to Senate resolution No. 98, and is as follows:

With the report in general I am in accord. But there is one feature of it about which I desire to be more explicit, and that is the paragraph discussing

the certainty of the provisions of the Sherman law as applicable to certain cases and its uncertainty as applicable to others.

I approve the view that "There are many forms of combination and many practices in business which have been so unequivocally condemned by the Supreme Court that as to them and their like the statute is so clear that no person can be in any doubt respecting what is lawful and what is unlawful."

There are other forms of organization and acts which seriously interfere with competition, such as interlocking directorates, watering of stock, selling of merchandise in one locality at a less price than in another, and other practices which are so contrary to sound business principles and good morals that they can and should be specifically controlled or prohibited by statute. As to these, in the interest of certainty, there should be other and further legislation. But, whatever may be the additional legislation, there will be many other contracts, combinations, and practices in "undue and unreasonable restraint of trade," which it is impossible for Congress to define by statute, because any attempt to so define them will, in practice, be found to exclude many other contracts, combinations, and practices which are equally inimical to the public good. As to these, we must always depend upon the sound wisdom and discretion of courts and juries for relief, just as in the past we have been obliged to trust to their judicial administration.

To illustrate: We know that legislatures and courts have constantly refused to define fraud because the multiplicity of acts and circumstances involved in human affairs make it impossible of definition.

The same may be said with equal truth as to what constitutes "undue or unreasonable restraint of trade."

It is said with a great deal of force that men are not always able to tell in advance whether certain acts are in "undue or unreasonable restraint of trade." But however difficult this may be, it is no reason why they should be left for decision to the selfishness of interested parties uncontrolled by judicial decision under the principles of the common law or under the broad provisions of the Sherman law.

In criminal cases it is often difficult to say in advance whether a given state of facts constitutes a reasonable doubt. But is that a reason why courts and juries should not attempt to say in a specific case whether there was, in fact, a reasonable doubt or not?

In negligence cases it is equally difficult to say whether a given state of facts constitutes contributory negligence on the part of the plaintiff or reasonable care on the part of the defendant. But can this be urged as a reason for not leaving special cases to the judgment of the court and jury?

In my judgment what is "undue or unreasonable restraint of trade" must, in many cases if not in most cases, be left largely for judicial determination, and sound judgment and good morals will be a sufficient guide for those who are actuated by a proper public spirit rather than by selfish motives.

While I believe there can be some additional legislation along the lines indicated, I am firmly of the opinion that the Sherman law is a clear and certain guide for reasonable men who desire to comply with the law and do not exert themselves to evade its provisions.

Mr. CARLIN. You started to say that you thought there were a number of other things which ought to be included and that the committee ought not to stop with those four. What other things have you in mind?

Mr. LEVY. I will show you. In paragraph 2, page 2, of the second bill, you say: "to limit or reduce the production or increase the price of merchandise or of any commodity." The bill says the words "every contract" or "combination," etc., shall be deemed to include any combination or agreement between corporations, etc., to do the things that I have just read; that is, to limit or reduce the production or increase the price of merchandise or of any commodity. I will ask you why did you leave out the words "or increase" after the word "reduce," in line 12? Why should not you have made it read, "to limit or reduce or increase the production or increase or reduce the price of merchandise or any commodity"? It should cover increasing the commodity, so as to prevent flooding the market, and thereby

crushing out competition. But you have limited it to reducing the commodity and increasing the price.

Mr. CARLIN. Because we want to do all we can to stimulate or increase the production.

Mr. LEVY. On the part of a combination intended to flood the market and crush a competitor for the moment?

Mr. CARLIN. I have never heard of such a case.

Mr. LEVY. It is done. I have heard of cases where the price is reduced to crush a competitor.

Mr. CARLIN. I have never heard of producing more of a necessary article in order to reduce the price.

Mr. LEVY. Oh, no. I say they increase the production in order to flood the market and drive the competitor out of business. They flood the market, and the price goes down and the competitor can not live.

But the argument goes more correctly to the next line, "or increase the price of merchandise or of any commodity." Why not "reducing"? Why not prohibit the reduction of the price where it is done by a combination in order to crush a competitor?

But the great criticism I have to offer to this bill and the principle I am arguing here is that the minute you take a statute like the Sherman law or any other statute like it and try to add schedules to it, or specific definitions, you immediately get into trouble.

Mr. CARLIN. You think we ought to enlarge the definitions, in other words?

Mr. LEVY. No; you ought to throw it all out, the whole bill, because you can not properly define restraints of trade. You can not define the methods by which a man can do a wrong. You must say the thing is wrong that is in restraint of trade, and do not say to a man, "You must not restrain trade by doing A or by not doing B or by doing C," because you can not hope to define every manner in which a man may restrain trade no more than, as Senator Pomerene has said, you can define contributory negligence or fraud, which, of course, is a conspicuous illustration.

Mr. CARLIN. Your argument, in its last analysis, would seem that we are making the Sherman law more rigid?

Mr. LEVY. Oh, no; you are making it more obscure and uncertain. You are attempting, of course, in the best of good faith, to make it more rigid. I say you can not make it more rigid, because it is now rigid and drastic to the last degree of human possibility.

Mr. CARLIN. You mean more elastic?

Mr. LEVY. No; I mean sufficiently drastic. That is why I dwelt upon the Jewelers' case, because, as I said, it merely followed the late decisions of the Supreme Court, where it said, though the motives were good and beneficial results followed, nevertheless the Sherman law prohibited it. I say that the Sherman law is drastic to the last degree of human possibility, largely because it is framed in general language, every syllable of which has been adjudicated by a long line of decisions, and when you attempt, in the best of good faith, to enlarge or define it you are bound to meet with difficulties; and I will furnish you right here an illustration of that in paragraph 2.

I say that again, with all deference and proper respect for the committee, that when you left out the words "or reduce," at the beginning of line 13, on page 2, you left out an important feature, which

Mr. Carlin has referred to and which is contained in another bill—the trade-relations bill—where you declare that it shall be deemed an unlawful restraint of trade to reduce or discriminate in the prices of commodities; and yet under this bill you left out that very important feature. You make it unlawful to increase the prices of merchandise or any commodity; you should, in my judgment, have made it unlawful to increase or reduce prices, if such act be part of a conspiracy or combination in restraint of trade.

Mr. CARLIN. This bill makes it unlawful to limit or reduce the production or increase the price of any commodity.

Mr. LEVY. Yes, sir. By this bill you make it unlawful to limit or reduce production or to increase the prices of merchandise.

Mr. CARLIN. And that is as far as this bill goes.

Mr. LEVY. Yes, sir. That is incomplete, and in itself makes that clause improper; moreover, it furnishes a splendid basis for the broader argument that you can not amend the Sherman law, except with great risk of damage to it. And further than that, the Sherman law does not need this amendment. Every one of those four paragraphs in section 1, Mr. Carlin—and I submit this with due deference and will prove it if the committee wishes—is now covered by the Sherman law, so far, at least, as this committee would want it to apply. That is a broad assertion, I admit; but it is the fact.

Mr. NELSON. Could you give us a citation of the cases in which it has been held directly that the Sherman law covers those points?

Mr. LEVY. I will do so if the committee wishes.

Mr. CARLIN. You say the Sherman law covers these points as far as this committee would want to go?

Mr. LEVY. Yes, sir. I mean by that, so far as you would want to try to curb the acts of combinations in restraint or trade, or, broadly, restraints of trade; in other words, what you gentlemen are really in good faith tying to do.

Mr. NELSON. And what do you conceive that to be?

Mr. LEVY. Combinations in restraint of trade?

Mr. NELSON. No; what do you conceive it to be that we are trying to get at?

Mr. LEVY. Well, to put it broadly, I think you are trying to get at the great, typical trusts. Then you are going a step further and trying to reach all those ramifications of trusts or things that grow out of trusts. The Department of Justice is going further than you gentlemen. I thing that what you are aiming at are the great, typical trusts, by the operation of which the regular flow of trade and commerce is interferred with. I purposely use broad language, because I am trying to meet the broad purpose which you gentlemen are aiming at. I am sure that it is not a matter of trickery with this committee, but that you are acting in good faith in trying to break up these obnoxious trusts, but I say that they are now being effectively broken up by the Department of Justice under the Sherman law as it now stands.

Mr. CARLIN. Do you think the Sherman law alone is sufficient, so far as the typical trust is concerned?

Mr. LEVY. I certainly do.

Mr. NELSON. You conceive, then, do you, that if we let the Sherman law alone the 800 or more trusts now in existence will voluntarily dissolve and go back to a condition of competition?

Mr. LEVY. Well, I do not know how many of such trusts there are. But if they are attacked by the Department of Justice, it has the power to make them surrender; the adjudications on the subject are so plain that they can not resist the Government; it would be the height of folly for them to resist the Government. I will ask you, for example, why the New Haven Railroad, the General Electric Co., the telephone company, and, if you please, these trade associations, have given up?

Mr. NELSON. Well, we do not know to what extent they have surrendered.

Mr. LEVY. But an inquiry would, I am sure, show that they have surrendered in good faith. I can speak, of course, definitely and officially with respect to these trade associations. We submitted to a very burdensome decree in respect of the things that were complained of. There is no doubt about that; and I may add that the Department of Justice did its duty in the matter most splendidly.

Mr. NELSON. These boards of trade, are they not formed to some extent to confer as to prices and to keep up certain prices?

Mr. LEVY. No, sir; not the ones that I alluded to.

Mr. NELSON. Do you mean the wholesale organizations?

Mr. LEVY. Yes, sir; the wholesale grocers, druggists, jewelers, dry goods and hardware dealers, and others have these national associations. Their main purpose is to maintain the distribution of their products through the wholesaler.

Mr. NELSON. To do what?

Mr. LEVY. To keep the distribution from the manufacturers so that it would be made through the wholesalers alone.

Mr. NELSON. So that the wholesalers would be able to levy a tax in the shape of a profit upon the article?

Mr. LEVY. Well, not necessarily. In that system there are, of course, both evils and benefits. But I see what you were alluding to, you were referring to the unnecessary profits of the middlemen, were you not?

Mr. NELSON. Yes.

Mr. LEVY. So far as they are unnecessary, they are of course an evil.

Mr. NELSON. And do they not also tend to prevent a sale direct to the consumer?

Mr. LEVY. No; not the wholesalers' associations.

Mr. NELSON. Well, could I as an individual consumer go to any wholesaler in this city who is a party to one of these trade agreements and buy goods from him?

Mr. LEVY. No; that would be by virtue of a retailers' association. Of course, the point you have in mind is quite correct. The wholesalers' association would not try to prevent the direct sale to the consumer; but the retailers' association would try to prevent the consumer getting the article direct.

Mr. NELSON. The retailer would bring pressure on the wholesaler, and the wholesaler would say to the consumer who desired to buy direct from him, "We can not do this because we are bound by an agreement with the retailer not to do so."

Mr. LEVY. That is true to some degree, and that is economically hurtful to some extent.

Mr. NELSON. Of course I am a Republican; but these gentlemen (the Democrats) have tried to reduce the cost of living by a change in the tariff. But as a matter of fact, do not your boards of trade and your wholesalers' associations and retailers' associations take up or absorb any benefit which might otherwise accrue to the consumer?

Mr. LEVY. No, sir; they say the contrary; they say that what they desire is to protect the consumer——

Mr. CARLIN (interposing). Pardon me, Mr. Levy; but it is by means of these hearings that our committee gets information, and I do not ask these questions for the purpose of interruping you——

Mr. LEVY. Certainly; I understand that, Mr. Carlin.

Mr. CARLIN. And you have been more or less in the public eye as an expert in these matters, and I want to ask you this question: Whether you had in mind the omission of that paragraph that we should have provided for prohibiting the fixing of prices all the way down to the consumer?

Mr. LEVY. I have not had it in mind. Price maintenance comes up in connection with this trade-association work that I have mentioned. I do not yet know how to meet that trouble, although I have given it much thought. That question did not come up in the Sherman-law suit which has just been terminated. There was no fixing of prices there.

Mr. CARLIN. What I had in mind was, Were you thinking of Mr. Brandeis's suggestion to the committee as to making it legal—the fixing of prices?

Mr. LEVY. I was not. That is a question that is difficult to determine, and, frankly, I did not have it in mind.

I will pass to section 3 of the bill, and say that there is some phraseology there that I think is bad. In line 5, on page 3 of committee's tentative bill No. 2, the words "said punishment" should come out, I think; it seems a surplusage. That is a mere formal criticism, of course.

The CHAIRMAN. It is surplusage, but it does not do any harm.

Mr. FLOYD. It follows the exact verbiage of the Sherman law, does it not?

Mr. LEVY. No, sir; I think this must have been a misprint. In the Sherman law the provision is "by a fine of not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments." This seems to be a misprint.

The CHAIRMAN. I think the words "said punishment" should be omitted.

Mr. FLOYD. Well, Mr. Levy, the word ought to be "punishments" also, instead of "punishment."

Mr. LEVY. Yes, sir. Now, as to section 4, on page 3, I have a much broader objection. That is the section that has been popularly called the "section to reach personal guilt." And the particular criticism I have to offer on that section is that the Sherman law unquestionably covers that feature, because I hold in my hand here [indicating] an indictment under the Sherman law. I have taken the trouble to bring it along with me.

I must repeat that I have no brief for the Sherman law in one way or another, except my conviction that it is effective.

Now, with respect to that section 4 of the bill, the "personal guilt" section, the purpose of it—as has been stated—is to bring home to

a particular individual in a corporation, who did the wrongful act, the criminal consequences of that act; and that, of course, is a praiseworthy purpose and one that ought to be carried out.

But I contend that that is done now by the Sherman law. Here [indicating paper in witness's hand] is an indictment in the case of The United States *v.* McAndrews & Forbes Co., and J. S. Young Co., and their respective presidents, and it would be interesting to read it to a committee composed wholly of lawyers, as showing the direct and specific way in which the offenses against the Sherman law were brought home to the two presidents of those two subsidiary corporations who were indicted.

Mr. McCoy. But how about the board of directors, Mr. Levy, which authorized the doing of the illegal acts which other people carry out, can you reach them under the Sherman law?

Mr. Levy. They would be indictable just as surely as you got the proof against them. Of course, without the proof you could not do anything against the officers or directors under this proposed bill; while, if you had the proof, you could punish them under the Sherman law.

The Chairman. Mr. Levy, are you familiar with the National Cash Register case?

Mr. Levy. Yes, sir; broadly speaking, I know something of it. The same thing was done there, I think. I speak with hesitation of that case, because I have no personal knowledge of it; whereas in this McAndrews and Forbes case I helped draw and try the indictment.

Mr. McCoy. Were the officers convicted in that case under the Sherman law?

Mr. Levy. The companies were convicted, but the two individuals were acquitted, because the sentiment in New York at that time—1906—was such that they could not be convicted.

Mr. McCoy. What did the judge charge the jury as to personal guilt of the officers?

Mr. Levy. Well, the case is clearer than if he had merely made a strong charge; because the indictment was demurred to, and the court overruled the demurrer to the indictment, and said that the indictment was proper and legal. And then he charged the jury that if the individuals did the things here specifically set forth, "If you find that they committed those acts you must find them guilty." The verdict which the jury brought in was, of course, an utterly absurd and ridiculous thing after that charge. It was—

> We find the two corporations, namely, the McAndrews Co. and the Forbes Co. guilty, and we find their respective presidents not guilty.

That is absurd on its face.

Now, I will show you how they brought home personal guilt there. I will read one paragraph of the indictment:

> And the said grand jurors aforesaid, upon their oaths aforesaid, do further present that, further, in pursuance of the said unlawful combination, and to effect the object of the same, and as an act on his part of engaging in the same the said Howard E. Young—

On such and such a date—

> at and within the said city of Baltimore, unlawfully did sign his name, to wit, H. E. Young, to a certain letter directed to the said other defendant in the city of New York, which letter is as follows.

And there was the offense charged. In other words, the president of one company wrote to the president of the other company, substantially, "Do this, that, or the other thing"—which constituted a restraint of trade; and their guilt was thereby made personal, under the Sherman law.

Now, how you can do that better under this section of committee bill No. 2 I do not know.

And when you get through with that, I will point out the first line in that section, being line 7 on page 3, which says, "That whenever a corporation shall be guilty of the violation of any of the provisions," etc.; and I will ask this: What do the words, "Whenever a corporation shall be guilty" mean? How is this guilt to be determined—by another indictment, by a separate equity suit, by a determination in the trial of the indictment against the individual? You have got dangerous language there. Read it again: "Whenever a corporation shall be guilty of a violation of any of the provisions of this act, the offense shall be deemed to be also that of the individual," etc., who authorized it, etc.

Now, I submit again to the committee, with the greatest deference and purely as a legal proposition, what does that mean? Observe, that I have passed from the broader proposition that the Sherman law, as this indictment in my hand proves, sufficiently covers "personal guilt"; and I ask, what do you mean by "Whenever a corporation shall be guilty," and how are you going to determine it? In other words, what is the use of that section 4? Why not leave the Sherman law alone upon this point?

I have here the report of the Department of Justice brought down to January, 1914, and you will find in it a report of a number of indictments against individuals brought under the Sherman law. I will read you some which have been recently found:

On December 1, 1913, an indictment was brought against a number of individuals in Colorado. On July 1, 1913, an indictment was found against the cotton-pool people in New York, which you gentlemen will doubtless remember. On June 25, 1913, an indictment was found in Oklahoma—and so on up to to-day they are finding indictments right along under the Sherman law; so why should you go further?

Mr. NELSON. Let me ask you this question, Mr. Levy: You would practically have the Sherman law stand as it is, would you not?

Mr. LEVY. Yes.

Mr. NELSON. Well, outside of the Knight case, which you say brought the law into confusion, you see no other need of further legislation to help matters, do you? Or, let me ask this question: How, then, do you account for all these trusts that are now in existence, in spite of the Sherman law, since the Knight case was decided?

Mr. LEVY. The reason was that the Knight case threw the whole Sherman law into obscurity. That case was decided in 1895; and not until 1899 did the Supreme Court declare, in the Addyston Pipe case, that the Knight case did not have the meaning which the legal profession had thought it had. So in the meantime these trusts grew bigger and bigger.

Now, from 1899 to 1904 was the period of their greatest growth. Nobody paid any attention in the profession to the provisions of the Sherman law——

Mr. CARLIN. Do you think the Knight case means anything now?

Mr. LEVY. I will say that the Knight case to-day is overruled in substance and effect. But the overruling of the decision in that case took such a long time to bring about that meanwhile all this obscurity as to the law arose; there was great doubt and obscurity on the part of the public and the profession. But there is now no real obscurity on the part of trust magnates and trust lawyers as to what the Sherman law means.

Mr. CARLIN. Nobody doubts that the Knight case has been overruled, do they?

Mr. LEVY. It has been overruled in substance, though not in words. It has been overruled; but in the meantime this confusion sprang up——

Mr. NELSON (interposing). Let me ask this question: Speaking at least for myself, as a member of this committee, I want to reach certain results. Do you believe that with the Sherman law remaining as it is now, these trusts—notably the Oil Trust and the Tobacco Trust and the Beef Trust——

Mr. LEVY (interposing). And the Sugar Trust.

Mr. NELSON. Yes; and the Sugar Trust. Do you believe that they would be dissolved?

Mr. LEVY. I have not any doubt of it.

Mr. NELSON. Without any further legislation?

Mr. LEVY. Absolutely so, in the manner in which you undoubtedly mean.

Mr. NELSON. Well, if they are monopolies?

Mr. LEVY. Then they could be broken up. The Sherman law is adequate to make them dissolve, and it has never failed when suit was brought. I will make an interesting assertion in that connection: The Government has never lost any of these suits; it always wins them.

Mr. NELSON. Then, in your judgment, it depends upon the activity of the Attorney General's office?

Mr. LEVY. Undoubtedly it does; and that was why in the earlier years of the Sherman law it went all askew. In the interest of brevity I have dwelt only on the Knight case, but there were also the Whisky Trust cases, in re Greenhut, and the case of in re Patterson, which was not a Whisky Trust, but the National Cash Register case—the same Patterson who has now been convicted. In the early days of the Sherman law the courts dodged it, and the executive officers of the Government were not vigilant. I am now adopting the suggestion which has been made by a member of the committee and which I did not feel justified in offering in the first place myself. But it was out of those things that the confusion grew. Those decisions were all wrong. But since 1899 the decisions have been correct, and since that time they have been correctly understood—or, at any rate, since the year 1911.

Mr. NELSON. Now, let us just follow that thought out. You say you have yourself found that the Department of Justice would not enter an appeal in certain cases?

Mr. LEVY. In that one case.

Mr. NELSON. In the Tobacco case?

Mr. LEVY. Yes.

Mr. NELSON. And yet you still wish to confine the right to institute suits to the Department of Justice, do you not?

Mr. LEVY. Yes.

Mr. NELSON. Well, why not broaden the law and permit outside parties to come in and, in a measure, take away this sole power of bringing suits from the Department of Justice?

Mr. LEVY. Well, Mr. Carlin will bear me out when I say that I have yielded somewhat in my view as to placing the right to bring an equity suit in an individual. I yielded somewhat to a suggestion which Mr. Carlin made. It was a new suggestion to me.

Mr. NELSON. Then you would agree to that, to taking this monopoly of bringing suits away from the Attorney General?

Mr. LEVY. I am inclined to think that in the light of this past experience I would. But it is a thing that ought to be worked out with the greatest care and caution.

The CHAIRMAN. Then, again, would you allow the judgment in a case brought by the Government to be used by private parties?

Mr. LEVY. No; I suggested the right of intervention instead.

The CHAIRMAN. Yes; I understand.

Mr. MCCOY. Well, suppose the law was so amended as to permit an individual plaintiff, or some plaintiff other than the Government, to intervene. How would you frame the law so as to prevent the usual control which any party to a suit has over that suit, and prevent the private party from being able to hold back the Government in any way, if he saw fit to do so?

Mr. LEVY. That can be done. And, as a matter of fact, it has been done in the same bill from which, apparently, the committee framed the clause we are now considering. I say that with some hesitation, as it is not any concern of mine, and perhaps it is not quite right to speak of the sources this committee has drawn upon in framing its bills. But in the bill which I have before me here, which contains a provision for res judicata, there is also contained a provision with reference to intervention, with the safeguards to which Mr. McCoy refers.

Mr. MCCOY. Do you refer to the Lenroot bill?

Mr. LEVY. No; I refer to the La Follette bill; I have it here.

The CHAIRMAN. The La Follette bill in the Senate is the same as the Lenroot bill in the House.

Mr. LEVY. This is the bill introduced by Senator La Follette on August 19, 1911.

Mr. CARLIN. The same bill was introduced by Mr. Lenroot in the House.

Mr. LEVY. Yes. That contains a provision for intervention by private parties, and also a provision for res judicata.

Mr. CARLIN. Mr. Levy, the committee is probably going to adjourn at 5 o'clock; and we are very much interested in your remarks, and if you have not concluded when we adjourn, I for one would be glad to fix some other time for you to come before the committee again, so as to give you every chance to be heard.

Mr. LEVY. I should be very glad to do so.

The CHAIRMAN. Mr. Levy, I suppose the committee would like to hear further from you, and perhaps you would like to have further time; but it is now 5 o'clock and we will have to adjourn in a few minutes.

Mr. LEVY. Yes, Mr. Chairman. My attitude is simply this, that I have a deep interest in this subject, purely from the scientific and professional standpoint. From that point of view, I will say that if I can help this committee in any way in arriving at a correct determination of the points involved, I shall be only too glad to do so; it will be a real privilege and a pleasure. I think there is danger of a serious error in some of this proposed legislation.

Mr. MCCOY. Was there anything further that you had in mind to say besides what you have already said?

Mr. LEVY. I would like to follow my remarks with a criticism that I will read from Dean Lewis, of the University of Pennsylvania.

Mr. MCCOY. Could you not just put that in the record?

Mr. LEVY. Yes; if the committee desires.

The CHAIRMAN. What is the paper you refer to?

Mr. LEVY. It is a criticism made by Prof. William Draper Lewis, dean of the University of Pennsylvania Law School.

The CHAIRMAN. To which bill does it apply?

Mr. LEVY. I think it criticizes all of them. It is contained in a newspaper extract. I can hardly discriminate as to what part is relevant and what part is not, and I will therefore leave it to the commitee to determine what part shall go in.

Mr. MCCOY. We can have the whole article incorporated in the record.

(The article referred to is as follows:)

Take another illustration. One of the proposed acts is designed to take out of the Sherman Act what is popularly known as "the rule of reason," which it is alleged that the Supreme Court read into the act when it held that only unreasonable restraints of trade are unlawful. This bill declares that hereafter the words "conspiracy in restraint of trade or commerce" and the word "monopolize," as used in the Sherman Act, shall include any combination or agreement between corporations, firms, or persons engaged in trade or business between the States for certain enumerated purposes.

SHOWS FLAWS IN THE PENDING BILL.

The second of these enumerated purposes is "to limit or reduce production." That contracts designed to limit or reduce production are frequently improper efforts to restrain trade or produce monopoly may be freely admitted. But the words of this proposed statute would prevent a number of manufacturers selling their goods in different parts of the United States and engaged, perhaps, in manufacturing different articles, being resident in one locality, from agreeing to close their mills at 1 o'clock on Saturday or to limit the number of hours that they work their help. Of course, the drafter of the act did not intend this result, but the question is not what the drafter intended, but what the act says.

Or again, the fourth prohibition is against making any agreement by which corporations, firms, or persons "directly or indirectly undertake to prevent a free and unrestricted competition among themselves." We may here also admit that in a large number of cases such agreements are agreements in restraint of trade, which should be and now are prohibited under the Sherman Act, but the proposed amendment would prevent two persons heretofore rivals in business from entering into a partnership, even though their combined business did not represent a fraction of 1 per cent of the volume of business in the United States or in any way tend toward monopoly.

Or it would prevent one business man buying the good will of another similar business under an agreement with the seller that the seller would not, after receiving the money for the good will, turn around and compete with the

purchaser in the same locality. Such agreements might, under certain circumstances, tend to monopoly, but normally, where they represent transactions between small purchasers, they are properly regarded as reasonable agreements not in any way tending to unlawfully restrain trade.

Mr. LEVY. Beyond what I have already said, there would be only general views that I might want to present. I will offer the suggestion that after the record of to-day is printed I might take it up and want to come back again before the committee.

Mr. MCCOY. I will make the further suggestion that there will be hearings of the committee at which other witnesses will be heard, and you can also get a copy of those, and after reading them you can come before the committee again if you so desire and give a further expression of your views in the light of what those witnesses say.

Mr. LEVY. I think that will be a good arrangement. Mr. Chairman, is that satisfactory?

The CHAIRMAN. I think that is a good idea, and we will have that understanding then.

(Thereupon, at 5.05 o'clock p. m., the committee adjourned until 10.30 o'clock a. m., to-morrow, Wednesday, February 4, 1914.)

APPENDIX.

THE FEDERAL ANTITRUST LAW AND THE "RULE OF REASON."

[By Felix H. Levy, New York City. Reprinted from the Virginia Law Review for December, 1913.]

At this time, when the subject of trust decisions and trust legislation as embodied in the Sherman antitrust law is occupying a large share of public attention, any additional light which can be thrown upon a situation which, by reason of an almost infinite variety of opinion, has become somewhat confused, ought to be deemed pertinent and timely. The views here set forth are presented in the hope of shedding some light upon that situation. They are given as the result of the writer's professional experience, derived both from the position occupied by him as a Government prosecutor under the Sherman antitrust law and from the position later occupied by him as counsel for defendants in prosecutions instituted by the Government under the law. The writer indulges the hope that the practical experience upon which these observations are based will render them of some value.

I. THE CONDITIONS WHICH BROUGHT ABOUT THE PASSAGE OF THE SHERMAN ANTITRUST LAW.

The Federal antitrust law (act of July 2, 1890, 26 Stat., 209, c. 647) has been known popularly as the Sherman antitrust law, because the bill which culminated in that law was introduced in the United States Senate by Senator Sherman, of Ohio. The bill thus introduced by him was, however, completely changed by the Judiciary Committee of the Senate, and as adopted by both Houses of Congress was totally different from the form of the bill as first presented by Senator Sherman.

The changes thus made were principally the work of Senators Edmunds and Hoar. It is the uniform opinion of those who have carefully studied the subject that no statute was ever passed by Congress involving a question of substantive law which received more thoughtful attention at the hands of profound and capable lawyers in Congress than the antitrust law which was adopted by Congress and became a law on July 2, 1890.

The immediate occasion which brought about the passage of this law was the existence at that time of a number of vast aggregations of capital which had then monopolized or bade fair soon to monopolize many important branches of trade in this country. The most conspicuous examples of these combinations

were the Sugar Trust, the Whisky Trust, and preeminently the Standard Oil Trust.

Without attempting to enter into any consideration of the debates which the passage of the antitrust law occasioned in Congress it must suffice to say that the most confident expectations were therein expressed that the passage of this law would speedily put an end to these monopolistic combinations and to the evil conditions to which they gave rise.

We shall, however, try to point out, in the cursory survey which we shall make of the subsequent history of that law, why that expectation was in large measure disappointed.

For the present purpose it will not be necessary to quote the text of the law beyond the portion which follows:

"An act to protect trade and commerce against unlawful restraints and monopolies.

"*Be it enacted, etc.*, That every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations is hereby declared to be illegal."

The foregoing extract will furnish a sufficient basis for presenting the apparently conflicting views of the courts with reference to the construction of that statute.

It may be broadly asserted that, with the exception of such parts of the statute as relate to matters of procedure and practice, and with the exception that the second section of the statute is in an immaterial sense an enlargement of the common law, the statute itself amounts to no more than a declaration of the common law upon the subject of restraints of trade.

It is well settled that in the Federal jurisprudence the common law with relation to crimes has no existence. It was on account of this fact and the further fact that prior to the passage of the Sherman antitrust law there was no Federal statute governing the subject; that until the act of July 2, 1890, there was no jurisdiction in the Federal Government to prevent or to punish restraints of trade or unlawful conspiracies and combinations to restrain trade.

In the course of the debates in the Senate which culminated in the passage of the law, Senator Sherman said (Senate Debates, Mar. 21, 1890, 21 Cong. Rec., p. 2456):

"It does not announce a new principle of law but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."

Senator Vest said (Senate Debates, Apr. 8, 1890, 21 Cong. Rec., p. 3146):

"We have affirmed the old doctrine of the common law in regard to all interstate and international transactions, and have clothed the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty."

The statement is ventured that all of the prevailing decisions of the United States Supreme Court under that law would have been decided in the same way in which the Supreme Court has decided them, if the Sherman law, so far as its substantive provisions are concerned, had merely provided in proper phraseology that the existing common law on the subject was declared to be the law of the United States and had provided appropriate penalties.

The scope of this paper makes it impossible to expand this contention at this time. Its propriety and correctness may, however, be shown concisely by a reference to the fundamental provision of the laws of the State of New York governing the subject, which is contained in the following provision of the penal law of that State, to wit:

"If two or more persons conspire * * * to commit any act injurious * * * to trade or commerce * * * each of them is guilty of a misdemeanor."

The revisers of the penal code of the State of New York, able lawyers of their day, who drew this provision, stated that it was intended to be merely an embodiment of the common law.

The courts of that State, in construing the quoted provision, have repeatedly declared that it represented merely a declaration of the common law, and they have in innumerable cases construed it in the most comprehensive manner as being sufficient to prevent and to punish, in a degree quite as drastic as the Federal courts have done under the Sherman antitrust law, all restraints of trade that have been submitted to them for decision.

II. THE SUGAR TRUST CASE.

The first case of importance, in fact the first case of any description, under the Sherman law, which received the attention of the United States Supreme Court, was the case of United States *v.* E. C. Knight Co. (156 U. S., 1), popularly known as the Sugar Trust case. In that case it was charged by the Government that the defendants, "being in control of a large majority of the manufactories of refined sugar in the United States, had acquired through the purchase of stock in four Philadelphia refineries such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business."

The Supreme Court held:

"That the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the provisions of the act of July 2, 1890, * * * in the mode attempted in this suit, and that the acquisition of Philadelphia refineries by a New Jersey corporation and the business of sugar refining in Pennsylvania bear no direct relation to commerce between the States or with foreign nations."

Putting it briefly, the substance of the decision seems to be that the situation there presented involved an intrastate and not an interstate transaction, and was therefore not within the purview of the Federal antitrust law.

The subsequent history of the Sherman law shows that the effect of this decision was most unfortunate. The confusion and the erroneous impressions which were caused by it are best exemplified by the statement contained in a report made to the House of Representatives by Attorney General Harmon on February 8, 1896, in response to a resolution of the House adopted on January 7, 1896, requesting the Attorney General to report what steps, if any, had been taken by him "to enforce the law of the United States against the trusts, combinations, and conspiracies in restraint of trade and commerce, and what further legislation, if any, is needed to protect the people against the same." In that report he said:

"The act of July 2, 1890, commonly called the Sherman antitrust law, as construed by the Supreme Court" (thereby evidently referring to the Knight case) "does not apply to the most complete monopolies acquired by unlawful combination of concerns which are naturally competitive, though they in fact control the markets of the entire country, if engaging in interstate commerce be merely one of the incidents of their business and not its direct and immediate object. *The virtual effect of this is to exclude from the operation of the law manufacturers and producers of every class, and probably importers also.*" (Italics mine.) * * * "The limitation of the present law enables those engaged in such attempts to escape from both State and Federal Governments, the former having no authority over interstate commerce and the latter having authority over nothing else."

The italicized portion of the above quotation makes clear that the learned Attorney General misconceived, and it is perhaps proper to say that he quite naturally misconceived, the true scope of the Sherman law as a result of the unfortunate decision in the Knight case.

Subsequent decisions of the Supreme Court, notably in the Addyston case, the Traffic cases, the Standard Oil case, the Tobacco case, which will be discussed post, and many others, clearly show that the opinion thus expressed by the Attorney General was erroneous. The circumstance is of importance when is it considered that, as a result of this misconception, which, it may be added, was shared by the profession generally, the Sherman law was for a long time deemed to be inapplicable to the many varieties of trusts and other industrial combinations which soon thereafter, and probably because of that decision, began to increase until nearly every branch of trade came under their domination. It seems safe to assert that no single circumstance was so potent in depriving the Sherman law of the effectiveness which w s subsequently imparted to it by later decisions of the Supreme Court as the decision in the Knight case.

In all of the conspicuous cases involving attacks by the Government under the Sherman law against trusts or industrial combinations the Knight case has been cited by the defendants as justifying their contention that the Sherman law is not applicable to such trusts or industrial combinations. Indeed, counsel for defendants in some of such cases have boldly asserted that the adjudication by the Supreme Court in the Knight case had become a rule of property and that to overrule it would make wrecks of the enterprises inaugurated by the combinations then under attack.

There can be no doubt that, beginning with the Addyston case, the Supreme Court, in a uniform line of decisions culminating in the Standard Oil and the Tobacco cases, has distinguished the force and application of the Knight case to such an extent as, for all practical purposes, to overrule it.

It is a fact, well recognized by expert students of the subject, that the misconception which the decision of the Supreme Court in the Knight case caused, was responsible in a very high degree for the fact that thereafter the Sherman law remained for many years virtually a "dead letter" upon the statute book. Instead of serving as an effective deterrent to the continuance of monopolistic combinations, as its framers intended it to be, the Sherman law, as thus seemingly devitalized by the Supreme Court in the Knight case, served for several years thereafter, and, until the misconception caused thereby was by later decisions corrected, rather as high evidence of the impotency of the Federal jurisprudence to cope with the subject at all.

III. THE ADDYSTON CASE.[1]

The first case which was presented to the Supreme Court under the Sherman law affecting an industrial agreement or combination in restraint of trade, after the decision in the Knight case, was the Addyston case. It was decided by the Supreme Court on December 4, 1899, nearly six years after the decision in the Knight case.

The case was heard upon an appeal from a decision of the Circuit Court of Appeals, the opinion in which was written by Judge Taft (later President Taft). As indicating the important bearing which the Knight decision was deemed to have at that time with respect to the Sherman law, the following is quoted from the opinion of Judge Taft in reversing the decision of the court below which dismissed the bill. Judge Taft said (85 Fed., 296):

"The learned judge who dismissed the bill at the circuit was of opinion that the contract of association only indirectly affected interstate commerce, and relied chiefly for this conclusion on the decision of the Supreme Court in the case of United States against E. C. Knight Co."

And further (85 Fed., 297):

"We have thus considered and quoted from the decision in the Knight case at length, because it was made the principal ground for the action of the court below and is made the chief basis of the argument on behalf of the defendants here."

Judge Taft then proceeded, and, so far as we are aware, it was the first time that any court had so done, to put aside the Knight case as an authority for the general proposition which was urged by the defendants in the Addyston case and which was substantially to the same effect as is set forth in the extract above quoted from the report of Attorney General Harmon. He does so in the following language (85 Fed., 299):

"To give the language of the opinion in the Knight case, the construction contended for by defendants would be to assume that the court, after having in the clearest way distinguished the case it was deciding from a case like the one at bar, for the very purpose of not deciding any case but the one before it, then proceeded to confuse the cases by using language which decided both. We can not concur in such an interpretation of the opinion."

For the first time, then, the narrow limits of the Knight decision were defined, and for the first time the authority of the Knight case as denying to the Sherman law the power to repress industrial combinations or agreements in restraint of trade was negatived.

When the Addyston case reached the Supreme Court that court disposed of the defendant's contention with respect to the Knight case in the following language (175 U. S., 211, 238):

"We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of the United States *v.* E. C. Knight Co."

Justification for the space here devoted to the Addyston case is to be found in the fact that the decision in that case first corrected the widespread misconception which had theretofore existed with respect to the applicability of the Sherman law to industrial or trade agreements or combinations. It is highly important to note that from the time of the decision in the Addyston case no misconception or doubt any longer existed, or, at any rate, needed to exist, and that

[1] Addyston Pipe & Steel Co. *v.* U. S. (175 U. S., 211).

thereafter the decisions of the Federal courts in construing the Sherman law as bearing upon industrial agreements and combinations of the kind which were then and ever since have been so common, moved forward in an unbroken line to the effect that such agreements were within the purview of the Sherman law and that combinations or agreements such as characterized the Sugar Trust and other like combinations were forbidden by that law.

The check upon the enforcement of the Sherman law which had been placed upon it as a result of the Knight case was thereby removed. Unfortunately, however, in the meantime the Sherman law had for all practical purposes become dormant and impotent, so that the promotion and formation of industrial combinations and trusts proceeded with renewed vigor and the industries of the country were virtually taken out of independent and competitive ownership and placed under the control of monopolistic combinations.

We repeat the assertion that this result, the evil effects of which are still so manifest, is attributable to the decision in the Knight case more than to any other circumstance.

At the risk of digression, the Addyston case, as decided by Judge Taft in the Circuit Court of Appeals, must again be alluded to in order to point out that the opinion written by Judge Taft is a memorable contribution to the juridical literature of this country, not only because in it he first clearly pointed out the proper limitations of the Knight case, but because he therein presented a most masterly exposition of the common law and the statute law bearing upon restraints of trade. His opinion may well serve as a textbook upon the subject of unlawful restraints of trade.

IV. THE TRAFFIC CASES.[1]

In discussing the Addyston case before discussing the Traffic cases, we have departed from the correct chronological order, both of the Traffic cases having been decided by the Supreme Court prior to the Addyston case. This departure has been made because the decision in the Knight case did not in any way affect the decisions in the Traffic cases, whereas, as above shown, the Knight case was an important factor in the Addyston case, and it was therefore deemed more logical to treat the Addyston case out of its chronological order so as thereby to supplement the consideration of the Knight case.

Just as the Knight case has been here discussed because of its great importance in its bearing upon the subsequent interpretation of the Sherman law, and just as the Addyston case has been here discussed because it corrected the misconception which had so disastrously affected the administration of the Sherman law, so now we adduce the Traffic cases as constituting an outstanding feature of importance in the history of the Sherman law. This outstanding feature is the circumstance that in the Traffic cases, the Supreme Court for the first time laid down the principle that, under the Sherman law, *every* restraint of trade, whether *reasonable* or *unreasonable*, is unlawful

A further notable circumstance in connection with the decisions in the Traffic cases is that in the Trans-Missouri case, Mr. Justice White (now Chief Justice White) declared in precise terms the "rule of reason" which subsequently, in the opinions written by him in the Standard Oil case and the Tobacco case, was advanced by him in the most conspicuous and controlling manner, as the guiding principle by which the Sherman law must be interpreted.

It thus appears that the now famous "rule of reason" as enunciated by the Chief Justice in the Oil case and the Tobacco case, was not promulgated in those cases for the first time, but had been previously enunciated in the plainest terms by him in his dissenting opinion in the Trans-Missouri case. For whatever historical value this fact may have, we quote the following from the opinion of Mr. Justice White in the Trans-Missouri case (166 U. S., 290, 351):

"Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not, in contemplation of law, contracts in restraint of trade. And it was this conception also, which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all is aspects, a contract of that character or one which was necessary to the freedom of contract and of trade."

Thus in substance Mr. Justice White laid down the principle of the "rule of

[1] United States *v.* Trans-Missouri Freight Association (166 U. S., 290); United States *v.* Joint Traffic Association (171 U. S., 505).

reason"; but, later on (id., p. 355) he lays down the principle in specific terms thus:

"If the *rule of reason* no longer determines the right of the individual to contract or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade?"

And again (id., p. 356):

"It follows that the construction which reads the *rule of reason* out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition."

We shall subsequently, in connection with a discussion of the oil and the tobacco cases, speak further of the "rule of reason" in those cases so conspicuously put forward by the Chief Justice.

Students of the subject have found it difficult to reconcile the comprehensive manner in which the prevailing opinions in both of the traffic cases (each of them written by Mr. Justice Peckham) declare that the distinction which existed at common law between reasonable restraints of trade and unreasonable restraints of trade did not exist under the Sherman law, with the statement contained in the second of the traffic cases (United States *v.* Joint Traffic Association, 171 U. S., 505), wherein Mr. Justice Peckham said (id., p. 568):

"* * * the act of Congress must have a reasonable construction or else there would scarcely be an agreement of contract among business men that could not be said to have, directly or remotely, some bearing upon interstate commerce and possibly to restrain it."

Moreover, Mr. Justice Peckham, in his opinion in the Joint Traffic case (171 U. S., 505, 568), declared that various examples, which were suggested by counsel, of contracts theretofore lawful, which would be rendered illegal if the distinction between reasonable and unreasonable restraints of trade were abolished, had "little or no bearing upon the question under consideration."

In the dissenting opinion rendered by Mr. Justice White in the Trans-Missouri case (166 U. S., 290), he cited many similar examples of particular classes of contracts which at the common law were considered partial or reasonable restraints of trade and therefore lawful. He did this for the purpose of showing that, under the construction placed upon the Sherman law by Mr. Justice Peckham, abolishing the distinction between reasonable and unreasonable restraints of trade, such classes of contracts theretofore deemed lawful would thereafter be deemed unlawful.

In the Joint Traffic case, wherein Mr. Justice Peckham made the statement that the class of contracts of this description "have little or no bearing upon the question under consideration," Mr. Justice White again dissented. He did not, however, render any opinion, apparently resting his dissent upon his opinion in the Trans-Missouri case, inasmuch as the two cases were similar.

In the dissenting opinion of Mr. Justice White in the Trans-Missouri case, there is set forth a most scholarly presentation of the distinction which prevailed at common law between a partial and reasonable restraint on the one hand, and a general or unreasonble restraint on the other hand, the former being at common law lawful and the latter unlawful.

It is perhaps a bold assertion to make, but the assertion is nevertheless made, that the subsequent history of the Sherman law shows that the subject, as set forth in the traffic cases, of the distinction between reasonable and unreasonable restraints of trade has proved to be entirely academic. It has had no practical bearing upon the interpretation or enforcement of the Sherman law in any case that has since come before the courts.

In every case under the Sherman law which has been decided since the decisions in the traffic cases were rendered, the decisions, which have been generally, if not uniformly, in favor of the Government, have rested upon a state of facts which would have necessitated a finding that such restraints were unlawful even if the common-law distinction between reasonable and unreasonable restraints had been explicitly maintained and upheld. In other words, the assertion is confidently made that no subsequent case has been presented under the Sherman law, wherein the Government has prevailed, where a different result would have been reached if the Sherman law had in terms provided that only *unreasonable* contracts, etc., in restraint of trade were forbidden. Every case which has been submitted to the courts, in which the Government has prevailed, has been based upon a situation which even at common law would have been declared to constitute an *unreasonable* restraint. Hence, we repeat, the distinction referred to has, in practice, proved unimportant.

V. THE STANDARD OIL AND THE TOBACCO CASES.[1]

These cases, decided by the Supreme Court in 1911, constituted the first cases in which any of the great trusts were subjected to attack in the Supreme Court under the Sherman law, with the exception of the abortive attack upon the Sugar Trust and the Knight case. They are notable particularly on account of the formal enunciation therein by Chief Justice White of the "rule of reason" as the controlling principle for the interpretation of the Sherman law.

Upon this ground, the opinions in both cases, each of them written by the Chief Justice, were sharply assailed by Mr. Justice Harlan as constituting "judicial legislation." (Harlan, J., in dissenting opinion in the Oil case, 221 U. S., at p. 99.)

Mr. Justice Harlan, moreover, assailed the decisions by declaring that the court "has, by mere interpretation, modified the act of Congress and deprived it of practical value as a defensive measure against the evils to be remedied"; and, again (Oil case, p. 104):

"* * * that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy."

Mr. Justice Harlan also asserted that the decisions were in effect an overruling of the decisions of the court in the Traffic cases.

These criticisms of Mr. Justice Harlan were contained in the dissenting opinion rendered by him in the Oil case. In the Tobacco case, which was decided later, the Chief Justice, *the entire court except Mr. Justice Harlan concurring*, thus replied to that part of Mr. Justice Harlan's dissenting opinion in the Oil case which asserted that the majority opinion in the Oil case constituted in effect an overruling of the decisions in the Traffic cases (Tobacco case, p. 179):

"In that case (Standard Oil case) it was held, without departing from any previous decision of the court, that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the Trans-Missouri Freight Association and Joint Traffic cases, 166 U. S. 290 and 171 U. S. 505). That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic case as follows (171 U. S., 568): 'The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.'"

As to the remaining criticisms of Mr. Justice Harlan to the effect that the resort to the "rule of reason" has "deprived the statute of practical value" and has "softened or modified" the policy underlying that statute, we assert that an examination of the opinions in the Oil and the Tobacco cases, and particularly the opinion in the Tobacco case, will make clear that, instead of depriving the Sherman law of practical value and of softening or modifying it, the effect of the two opinions has been to *strengthen and enlarge* the scope of that law.

In the opinion in the Tobacco case (p. 175), the Chief Justice said:

"If the Antitrust act is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insist that situation presents, it can only be because that law will be given a *more comprehensive application than has been afforded to it in any previous decision.*"

And, again (id., p. 178):

"But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the antitrust act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the act, *since it renders it impossible to*

[1] The Standard Oil Co. *v.* United States (221 U. S., 1); United States *v.* American Tobacco Co. (221 U. S., 106).

apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter."

And, again (id., p. 180):

"In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible, serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil case, the application of which rule, to the statute we now, in the most unequivocal terms, reexpress and reaffirm."

It seems too clear for discussion that these emphatic statements of the Chief Justice make it clear that the "rule of reason" was invoked not for the purpose of restricting or narrowing the force of the statute as previously construed, but, on the contrary, for the purpose of broadening and enlarging it.

As above quoted, the Chief Justice said that in the Tobacco case the statute "will be given a more comprehensive application than has been affixed to it in any previous decision." The reasoning which follows this statement shows that the purpose of such statement and the purpose of invoking the "rule of reason" was to bring within the condemnation which the court was about to give to the assailed combination, certain elements and features of the combination which would escape such condemnation if the narrower rule of construction laid down in previous cases were maintained. The court therefore declared its purpose to broaden and enlarge the scope of the statute by viewing it in the "light of reason" so as thereby to ascertain the true intent of Congress in enacting the statute. The court then declared that the statute, thus viewed, brought within is scope all of the elements and features which would otherwise not be included therein.

It is submitted that it is difficult to imagine how the reasoning thus pursued and the result thus reached by the Chief Justice can be construed as involving a curtailment or narrowing of the scope of the statute.

Adopting the objections made by Mr. Justice Harlan, critics of the "rule of reason" have declared that the result of the engrafting upon the statute of the "rule of reason" has been to emasculate that statute. This assertion has been repeatedly made in the two Houses of Congress. The criticism has, however, been met by students of the Sherman law, who have based their position upon practical experience in the administration and interpretation of that statute, with the diametrically contradictory assertion that the "rule of reason" has given additional vitality and vigor to the statute. They assert that, as stated by the Chief Justice in the Tobacco case (p. 181) in view of the general language of the statute and the public policy which it manifests, there is no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since *resort to reason* renders it impossible to escape by any indirection the prohibition of the statute.

In other words, they say that, viewed in the light of reason, the statute is now made to penetrate any device or subterfuge which might otherwise successfully conceal a purpose to violate the statute.

Viewed from another standpoint, it is difficult to comprehend the reason for the clamor which has been raised against this feature of the Oil and the Tobacco cases, inasmuch as the subsequent decisions of the courts, based expressly upon the decisions in the Oil and the Tobacco cases, have not in the slightest degree relaxed or abated the vigor and force of the statute from the vigor and force which it possessed prior to the rendering of those two decisions. In a number of very recent cases involving a variety of different situations decided by the Supreme Court since its decisions in the Oil and Tobacco cases, the statute has been interpreted and enforced with the same degree of strength as before the "rule of reason" was announced. These cases are the following: United States *v.* Terminal Railroad Association, 224 U. S., 383, decided April 22, 1912; Standard Sanitary Manufacturing Co. *v.* United States, 226 U. S., 20, decided November 18, 1912; United States *v.* Union Pacific Railroad Co., 226 U. S., 61, decided December 2, 1912; United States *v.* Reading Company, 226 U. S., 324, decided December 16, 1912; United States *v.* Patten, 226 U. S., 525, decided January 6, 1913; Virtue *v.* Creamery Package Mfg. Co., 227 U. S., 8, decided January 20, 1913; United States *v.* Winslow, 227 U. S., 202, decided February 8,

1913; United States *v.* Pacific & Arctic Railway Co., 228 U. S., 87, decided April 7, 1913; Nash *v.* United States, 228 U. S., 373, decided June 9, 1913.

Forcible illustration of the fact that the Supreme Court has not, in these later decisions, regarded the statute as having been "softened or modified" by the "rule of reason" is found in the following extract from the opinion of the court in the case of Standard Sanitary Manufacturing Co. *v.* United States (supra), in which Mr. Justice McKenna, referring to previous decisions, said (p. 49):

"The others it is not necessary to review or to quote from, except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy 'by resort to any disguise or subterfuge of form' or the escape of its prohibitions 'by any indirection' (United States *v.* American Tobacco Co., 221 U. S., 106, 181). Nor can they be evaded by good motives. The law has its own measure of right and wrong, or what it permits or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results. (United States *v.* Trans-Missouri Freight Association, 166 U. S., 290; Armour Packing Co. *v.* United States, 209 U. S., 56, 62.)"

We have said above that it is difficult to understand the reason for the clamor which has been raised against the "rule of reason" which was invoked in the Oil and the Tobacco cases. We apprehend that this clamor is well justified when the *ultimate* results of those two cases are considered; but that such clamor is misdirected when the "rule of reason" is made the object of its attack. The just basis for such clamor and, in fact, the just explanation of the widespread dissatisfaction with the operations of the Sherman law which seems to exist, is the manner in which the decisions of the Supreme Court in the Oil and Tobacco cases have been *executed*. This is notably true in the Tobacco case.

There is a general belief that in the execution of the Supreme Court's decision in the Tobacco case by the circuit court, the administrative officers of the Government failed to carry out the declared purposes of the Supreme Court, and that, as a result, the so-called dissolution or disintegration of the Tobacco Trust has proved to be, in large part, unsatisfactory. The same remarks apply, with some modifications, to the final result in the Standard Oil case. The notable consequence has been that these notorious trusts are thought by the community generally to have escaped the punishment which they deserved. The community has attributed the blame for this unfortunate condition upon the Sherman law itself, and the exponents of the victims of these combinations have declared that these decisions show that the Sherman law has been weakened and requires strengthening by amendment. As a matter of fact, the complaints of these victims have ample ground, but their criticism should not be directed against the Sherman law, but rather against the manner in which that law was put into effect in the two particular cases in question.

CONCLUSION.

Summarizing the views which have been thus set forth, it appears that the Sherman law having been enacted in the year 1890 to meet a situation which was then deemed by Congress to be most grave and threatening, with respect to the alarming growth of huge aggregations in restraint of trade, the statute remained practically dormant until, in the year 1895, the Supreme Court, for the first time, considered it in the Knight case. That case resulted in a decision by the court which was generally, if not universally, accepted as meaning that the Sherman law did not apply to industrial or trade combinations and agreements in restraint of trade. Encouragement was thereby given to persons engaged in business on a large scale to proceed in the monopolistic practices which were then in vogue; and to other persons, to extend the field of their operations by creating new and even larger combinations, whose purposes were to engross or control the particular branches of industry which were thereby affected. The next development in the history of the Sherman law was that, in the year 1899, the Supreme Court considered and decided the Addyston case, and for the first time made it evident that the previously existing views based upon the Knight case were erroneous and that the Sherman law did, in fact apply, as its framers intended that it should apply, to industrial or trade combinations and agreements in restraint of trade. In the same year the Supreme Court considered and decided the two Traffic cases, and gave, as was then generally believed, an even

wider scope to the Statute by declaring that it applied to all restraints of trade, whether the same were resonable or unreasonable.

In spite of these plain declarations by the Supreme Court of the comprehensive scope of the antitrust statute as affecting not merely common carriers but also industrial combinations of the kind which were then and ever since have been so common, the great impetus which had been given, by the misconceived purport of the Knight case, to the formation of industrial combinations, was not checked. On the contrary, it proceeded with renewed vigor, so that in the period from 1899 to 1904, the number and the size of the industrial combinations created were far greater than before that period.

The limits of this paper have not permitted of any consideration of the circumstance that in the year 1902, under the administration of President Roosevelt, a policy of drastic and general enforcement of the Sherman law was begun. Under this new policy a suit was brought by the Government on March 10, 1902, in the Circuit Court of the United States for the District of Minnesota against the Northern Securities Co. to dissever the union of the Great Northern Railway Co. and the Northern Pacific Railway Co., which union was in effect brought about by the formation of the Northern Securities Co. as a holding company of the stock of the two railway companies. On March 14, 1904, the Supreme Court affirmed the decree of the circuit court which granted the injunction prayed for by the Government, and thereby brought about the dissolution of the securities company.

During the remainder of the Roosevelt administration the Government instituted more than 40 prosecutions under the Sherman law as compared with a total number of only 18 prosecutions instituted by the Government from the time when the Sherman law was enacted in 1890 to the commencement of the Roosevelt administration in 1901. It may be noted that it was during this period of great activity under the Roosevelt administration that the suits against the Standard Oil Co. and the Tobacco Trust were begun.

For the first time, then, the business community was aroused to a recognition of the drastic and far-reaching force of the antitrust statute. Lulled into the belief that the statute lay on the statute books as an idle and impotent thing—a belief quite justified prior to the Addyston case because of the mistaken conception of the law as defined in the Knight case—the business community was rudely awakened to a recognition of the fact that the antitrust law constituted a statutory provision of the most drastic nature. It was perhaps natural that widespread criticism should arise and that the contention should be made that the law had not been properly understood by the business community. It was further contended that conflicting decisions of the courts had rendered the meaning of the statute indefinite, obscure, and uncertain, so that the community at large could not and did not understand its meaning.

It was perhaps natural that these expressions of alarm and protest should have been made, but it is difficult for the student of the Sherman law to understand the basis for the contention that the law was obscure or indefinite in its meaning. Except for the conceded obscurity occasioned by the Knight case, it may be safely asserted that none of the subsequent decisions of the Supreme Court were in any respect vague or uncertain, nor did they in any manner depart from the uniform line of construction to the effect that the Sherman law, as did the common law for centuries before it, condemned and forbade the wrongful and harmful practices employed by huge aggregations of capital.

The limitations of this paper must make it suffice to say that, beginning with the decision in the Northern Securities case, a great variety of cases were begun by the Government under the antitrust statute, the decisions in which almost uniformly upheld the force of the statute as contended for by the Government. These decisions culminated, in the year 1911, in the decisions of the Oil case and the Tobacco case.

In these cases the true force and effect of the statute was defined more vigorously, although not upon any new principle, than in any of the previous decisions. In them, as has been pointed out above, the Supreme Court declared the "rule of reason" as being the guiding principle for the interpretation of the statute.

Whatever doubt or uncertainty may have existed prior to these decisions, experts of the antitrust statute assert that there can no longer be reasonably made any contention or claim that the statute is any longer uncertain or doubtful in its meaning. Aside from the discussion, more or less prevalent, that the distinction between a reasonable restraint and an unreasonable restraint has caused uncertainty—a distinction which, for all practical purposes, as has

been shown above, is merely academic—it is confidently asserted that the meaning and the construction of the statute have been made perfectly plain. It has been well said that "the act under the interpretation of the Supreme Court is clear enough already, save for those who will not understand it, and * * * that in attempting more explicit legislation Congress may stumble upon difficulties of which it now has very little idea."

No attempt has been made in this paper to consider or discuss the economic policy which underlies the antitrust statute, nor the wisdom of the drastic manner in which the statute has been enforced by recent and existing national administrations. But in so far as is concerned the question of the present certainty of the meaning of the statute and its efficiency to meet the conditions which it was intended by its framers to meet, without and amendment as to its substantive provisions, we venture to assert that the history of the statute, as outlined in the foregoing pages, shows that no such amendment is necessary.

By the statement above made that no amendment is necessary, reference is had only to the substantive provisions of the act. No opinion is expressed with regard to the advisability which appears to be under general consideration in Congress at this time, of enacting new and supplementary legislation relating to interlocking directorates, holding companies and similar subjects, for the reason that such proposed legislation is not germane to the subject which has been here discussed.

TRUST LEGISLATION
FEB26 1914

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 7

STATEMENTS OF

JAMES E. BENNETT, F. A. GOOD
AND E. E. HALL

FEBRUARY 9, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Statement of: Page.

James E. Bennett, of New York..... 287

F. A. Good, of Cowles, Nebr..... 302

E. E. Hall, of Lincoln, Nebr 305

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, JR., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
WALTER I. McCOY, New Jersey.
DANIEL J. McGILLICUDDY, Maine.
JACK BEALL, Texas.
JOSEPH TAGGART, Kansas.
LOUIS FITZHENRY, Illinois.
JOHN F. CAREW, New York.
JOHN B. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY G. DANFORTH, New York.
LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 7.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Monday, February 9, 1914.

Mr. CARLIN. Now, Mr. Bennett, we will hear you. Give your name, address, and occupation to the reporter.

STATEMENT OF MR. JAMES E. BENNETT, ATTORNEY AT LAW, 150 NASSAU STREET, NEW YORK CITY.

Mr. BENNETT. My name is James E. Bennett; I am an attorney; my address is 150 Nassau Street, New York City. I am almost ashamed to speak after the Amalgamated Copper Co. has been heard here, because I am so small, and the people I represent are so small. I represent a number of manufacturers of printing presses who are corporations, manufacturers of bookbinders' board, an importer of paper, a manufacturer of ladies' waists, and a few little corporations like that, organized all the way from $30,000 up to $3,000,000. We never worried about this trust legislation we have seen so much about in the newspapers from time to time until some man called our attention awhile ago to the fact that we were engaged in interstate commerce, and that while the bill apparently was aimed at the trusts it looked as though some of the shot would scatter and

hit us; and in the last two or three days we have been considering among ourselves whether these tentative bills would strike us. Just this morning I had the pleasure of reading a bill introduced by Mr. Morgan of Oklahoma, which was referred to the other committee, the Committee on Interstate and Foreign Commerce. Of course, if that bill was adopted, I would take the next train back to New York, and I would be perfectly content, because that only affects corporations whose gross business amounts to $5,000,000 per annum or over. The largest corporation I represent does not do a business of more than $3,000,000 per annum, so that if that $5,000,000 clause was put in this bill we would rest perfectly comfortable. I do not know whether that bill is going to be adopted or not, so I would like just a moment or two of your time to find out whether your bill does strike us, and if it does not we will not be hit even by bird shot.

In the first tentative bill, section 9, it is provided:

> That is shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations, or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller.

Now, I will tell you how we sell a printing press and then, perhaps, you genetlemen can tell me whether we have been discriminating in price. You probably are familiar with the names of many of the large printing-press manufacturers of the country, like R. Hoe & Co., Gauss & Co., of Chicago; the Cottrell Co., of Rhode Island; the Potter Co., of Plainfield, N. J.; and the Scott Co., of Plainfield.

Now, let us assume that the chairman—who is not here, so we can speak of him—is in the printing business in Chicago, and he lets it be known that he wants to buy an ordinary flat-bed, two-revolution press, the kind they use in printing these hearings. Now, you read our catalogues, and you will find that we have a fixed price, but it is only true in the catalogues. Anything you hear to the contrary is not true. Now, we go to this man in Chicago, and the Scott Co. is there, the Hoe Co. is there, the Babcock Co. is there, the Miehle Co. is there, the Whitlock Co. is there, and we look over his plant, and see what we have to do, whether we have to take out a window, etc. The normal price of the press is somewhere around $3,000. We work on that man. We have a salesman there and we work on the foreman, and we work on everybody that we think has a little pull, and finally he signs up with us for some one of the presses.

Now, we will say the price fixed on is $3,000, and we will say that the Miehle Co. sold the press. Now, another man in Chicago, three months afterwards, wants to buy a press and we go there and go through the same thing, and we sell him a press for $2,500. Competition happens to be a little bit stiffer, and maybe his credit is better, because these presses are all sold on time. Anyhow he gets it for $2,500. Now, it is the same press. Are we guilty of a discrimination in price or are we not? It says here that we are if we injure a competitor. Now, we never knowingly help a competitor. We have the option here to injure or destroy him. He may say that we are injuring the Miehle Co., because the first press was sold for $3,000, while the Babcock Co. got the second press for $2,500. Now, the Miehle Co. claims that they have been injured to the extent of $500 because

that price was not maintained. I do not know whether it can be maintained or not. The worst of it is that there is no way under heaven that I can tell whether the courts are going to uphold the interpretation that you may put upon this law. That is why we are worried about this provision in regard to discrimination in price.

Mr. CARLIN. Well, you understand what that section means, do you not?

Mr. BENNETT. No, sir; I do not.

Mr. CARLIN. It means just what it says.

Mr. BENNETT. Well, you were not here, unfortunately for me but fortunately, perhaps, for you, a while ago when I made a dissertation on that subject.

Mr. MORGAN. Would you not think that includes you as well as anybody else?

Mr. BENNETT. I am perfectly free to admit that I have talked over this matter with the vice president of the Miehle Co., the president of the Cottrell Co., the secretary of the Hoe Co., the general manager of the Babcock Co., and the general managers of other companies, and they are absolutely of the opinion that these words "discriminate in price," in connection with the other language here, would absolutely prevent our method of sale.

Mr. CARLIN. Do you mean to say that you sell the same printing press at different prices in different sections of the country?

Mr. BENNETT. We sell at different prices in the same section of the country. Now, we will take Mr. Jones and Mr. Brown. They both want to buy a printing press. Mr. Jones has good credit and Mr. Brown has not. We sell most of our printing presses on time. We will sell you a $3,000 at $250, and you pay us $50 a month until the balance is paid, if your credit is good. Another man may insist on having $1,000 down and he will charge more. The competition to sell a machine to the man whose credit is not so good is not very keen. If the competition is good he is going to get a less price. This has been the history of all of the concerns in the country. I have been interested in printing-press concerns for about seven years, and that is the way they do business.

Mr. CARLIN. There is nothing in this bill that would prohibit you from fixing a credit price and a cash price.

Mr. BENNETT. Yes, sir; but we have no such prices.

Mr. CARLIN. Provided the prices were the same in every section of the country.

Mr. BENNETT. Yes, sir. But during the life of the printing-press companies they have never been able to do that. If the Government were to tell us that the price of a 42 by 50 bed two-revolution press should be $2,000, no more and no less, we would be satisfied and go home to-night. If they should say that a small pony revolution press, 24 square sheet, shall sell for $1,750, no more and no less, everywhere in the country, we would be satisfied. We are not permitted to agree on any price ourselves. No. We would run right plumb up against the Sherman law, if we do agree; if we do not agree it looks as though we would get hit here. I will not say that we are between the devil and the deep sea because this committee might be on one side or the other. I do not know where we would be.

Mr. FLOYD. This would allow you to fix the prices of your commodities to suit yourselves, independent of the prices fixed by your competitors. The purpose of this legislation is to prevent you from discriminating, but it does not attempt to fix your prices.

Mr. CHANDLER. Your intention is not to injure or destroy, as I understand your statement, but it is to protect yourselves in your simple business dealings with your customers.

Mr. BENNETT. It is to protect ourselves, and if our competitor loses a contract because we are selling one man a press at $2,500 instead of $3,000, our competitor can not complain that we are injuring him.

Mr. CHANDLER. When you are trying to make a sale do you have the competitor in mind or are you simply dealing independently?

Mr. BENNETT. We never sell a press with the competitor in mind; we sell it to get the sale. But he might claim that we were cutting prices and injuring him.

Mr. CARLIN. He might claim it, but the object of this legislation is to require you to sell your presses at the same price, plus transportation, all over the country, and your competitor must do the same thing.

Mr. VOLSTEAD. Suppose there are two men in the same town and one buys a press at $2,500 and the other buys it at $3,000. I presume the man why buys it at $3,000 might claim that he was hurt.

Mr. CARLIN. This would prevent that very thing. That is exactly what this provision is intended to do.

Mr. BENNETT. But suppose we sell a press to-day at $3,000. What is to prevent us from changing our price and selling it to-morrow at $2,500 and the next day at $3,000? Suppose we get up a little schedule and say, "Price for February 9, $3,000"; to-morrow we get up a little schedule and we say the price is $2,500; and the schedule for the following day is so and so; who is going to say it is not?

Mr. FLOYD. That is all right if that price is uniform throughout the United States.

Mr. BENNETT. But we never sell more than one press a day, and if we did we would be millionaires.

Mr. CARLIN. As I understand you, what you want is the right to sell a half dozen presses in the same town at different prices.

Mr. BENNETT. We want the right to come here and sell a printing press to the Government Printing Office or to the Star Co. in open competition, and get the best price we can, irrespective of any price we have gotten before; and this will prevent us from doing that.

Mr. CARLIN. That is exactly what it is designed to do.

Mr. BENNETT. Well, I thought we wanted competition.

Mr. CARLIN. But that provision has some regard for the fellow who is doing the buying.

Mr. BENNETT. Well, let us say that it is intended for that purpose. What price are we going to fix? The lowest price we have ever sold it for or the highest price?

Mr. CARLIN. That is your business.

Mr. BENNETT. Then everybody is going to fix the best price. Now, where is the man who is purchasing the press going to find himself? Where is he going to get off? This is going to come just as near as the Sherman law can come to getting us together and making fixed prices.

Mr. CARLIN. But you can not get together, because that is prohibited.

Mr. BENNETT. Yes, sir; but——

Mr. MORGAN (interposing). Do you not think that this would drive you together, not by mutual agreement, but——

Mr. BENNETT (interposing). I will say that we are nearer together now than ever before.

Mr. CARLIN. If you come together it will drive you to jail.

Mr. BENNETT. I am free to say that this is the only thing they have agreed in in a hundred years.

Mr. DANFORTH. Your idea is that if the price is fixed for each man you have stifled competition.

Mr. BENNETT. Yes, sir; and the mere fact that we have fixed the price is going to be evidence that we are guilty.

Mr. CARLIN. And if you attempt that, it would not only be evidence of being guilty but you would be guilty.

Mr. BENNETT. Yes, sir; but what would we do?

Mr. CARLIN. I think you would compete. That is what I think you would do.

Mr. BENNETT. Well, if we compete, then prices are going to be hit or we are going to try to get around them and we are going to change our prices every time we sell a press; we are going to get up a new schedule. Of course, in New York City we are all engaged in interstate traffic. New York is a place to sleep, and everything is sold to New Jersey and other States.

Mr. CARLIN. You say New York is a place to sleep?

Mr. BENNETT. Yes; if you get on the top floor. Now, all of us being engaged in interstate commerce, suppose we were all compelled to file with the Interstate Commerce Commission a schedule of prices. That is the only way the Interstate Commerce Commission can govern the railway companies and other common carriers. They are compelled to file tariffs. That is the only way you can make us live up to that.

Mr. CARLIN. Mr. Bennett, if we can not make you live up to it, you have no complaint. I would not let that worry me.

Mr. BENNETT. No; the lawyer never lets the troubles of his client worry him, but he has always the right to tell them to the judges, hoping that the judges will come his way. I think I have made it clear how we think the discrimination in prices affects us in our business.

Mr. VOLSTEAD. Suppose we strike out the words in the fourth and fifth lines, "with the purpose or intent to thereby injure or destroy a competitor"; would that materially affect you?

Mr. BENNETT. So that it will read, "to discriminate in price between different purchasers of commodities in the same or different sections or communities," and stop there?

Mr. VOLSTEAD. I mean strike out the provision regarding the intent to injure.

Mr. BENNETT. Of course, if it were not written in the law the judges would put it in.

Mr. FLOYD. It would then hurt you worse than if it was written in the law.

Mr. BENNETT. Then they would smear it all over the landscape. I understand the committee is trying to shoot a rifle shot at some trust, and I do not want them to shoot bird shot.

Mr. FLOYD. Here is the evil we are trying to correct: In many instances large concerns will reduce the price of their commodities in a certain territory in order to drive out and destroy a competitor.

Mr. BENNETT. Yes.

Mr. FLOYD. There are some notable instances in which that has been done to reduce the price below the cost of production, and in many States statutes have been passed to prohibit that. This follows the wording of the New Jersey statutes. In some States it says, "If it is reduced below the cost of production." We followed the language of the New Jersey statute.

Mr. BENNETT. Do you know how this New Jersey statute has affected the price of gasoline?

Mr. FLOYD. No; I do not. I will hear you on that when I have finished my statement.

Mr. BENNETT. I beg your pardon.

Mr. FLOYD. You can lower your prices every day or every week, or raise them, but if you lower them or raise them in one place you must lower them or raise them uniformly.

Mr. BENNETT. We can change them the next day.

Mr. FLOYD. You can change them the next day, but you would have to sell them uniformly all through the country. You could not sell one press here at one price and another press in New York on the same day at a different price. Of course, you would have to allow for the cost of transportation.

Mr. MORGAN. Is your business done on a percentage of profit?

Mr. BENNETT. Yes, sir.

Mr. CARLIN. What is your percentage of profit?

Mr. BENNETT. The percentage of profit in the printing-press industry—when I say any percentage of profit that includes the money available for dividends or salaries of officers—is about 5 per cent. Some of the companies are small and do not pay any dividends and some of them are big and do not pay any dividends, but the average percentage of profit is about 5 per cent on the capital invested. Those are the latest figures for 1912.

Mr. CARLIN. Let us take the question of cost of production of a printing press that you sell at $2,500. What would that cost you to produce?

Mr. BENNETT. It depends upon the manufacturer—the Whitlock Co., in Derby, Conn., and they get very cheap help. Of course, it is good help around there, but they do not average over 30 cents an hour, and they turn out 15 or 18 presses a month. They have only certain patterns. The Babcock Co., at New London, Conn., has an average cost of 45 cents which they pay their laborers. The rest of the work is about the same.

Mr. CARLIN. How many companies are there manufacturing printing presses in this country?

Mr. BENNETT. Well, when you talk about printing presses, they run all the way from the little things printing cards to the big sextuple presses printing newspapers.

Mr. CARLIN. I mean job-printing presses.

Mr. BENNETT. The Hoe Co., the Scott Co., the Duplex Co., and the Gauss Co. are the four companies manufacturing practically all the newspaper presses. The Miehle Co., of Chicago, and the Babcock Co. and the Whitlock Co. are the three companies that manufacture the flat-bed presses that publish the ordinary books and things like that. Then there are, I should judge, about 18 manufacturers of job presses; that is, what we call a job-and-platen press. It has a small circle up here [indicating], where the inking rollers do the inking, and then it comes down this way [indicating], and the printing surface comes up like this [indicating]. You may have seen them in the shops. The business is divided among those three about equally. The Cottrell Co., of Rhode Island, makes book presses for work that is hardly touched by any other company. It is almost in a class by itself, like the Saturday Evening Post and the Ladies' Home Journal, Sears, Roebuck & Co.'s catalogues, and an enormous amount of cheap book and catalogue work that has to be run through about 20 miles an hour.

Mr. DANFORTH. You were going to tell us about the price of gasoline in New Jersey as affected by the New Jersey statutes.

Mr. BENNETT. A man told me last week that he was riding out in his car, and they stopped at a small garage in the country, where he could buy only a few gallons of gasoline at a time, and he paid a very large price. When he came to town he would buy it from 2 to 4 cents cheaper per gallon, because they could afford to sell it more cheaply by reason of selling large quantities. He says that now the price is uniform, and he is paying the same price in the country, and the city price is the same as the country price.

Mr. DANFORTH. That has helped the consumer?

Mr. BENNETT. That has helped the man who is running the car.

Mr. VOLSTEAD. I hope that is true outside of New Jersey.

Mr. BENNETT. I do not want to take any more of your time than is necessary, because I do not think that my matter is of such tremendous importance as those of the great big companies.

Mr. MORGAN. How do you think this ought to be changed now?

Mr. BENNETT. I would leave it out, or else I would put a little more to it. I like your suggestion of $5,000,000, and you could even make it $3,000,000 and we would be satisfied.

Mr. MORGAN. If it was put down to $1,000,000 it would take out most of them.

Mr. BENNETT. Yes, sir. Only three of our companies in the printing-press business do an annual business of $1,000,000.

Mr. MORGAN. None of those concerns could in any way be called a trust?

Mr. BENNETT. No, sir. The only trust they have is in their customers, and it is frequently misplaced.

Mr. MORGAN. There is no fixing of prices, and there is really very great competition at this time?

Mr. BENNETT. Yes, sir. We have transportation competition. There is never a press sold, except the small job press, that there are not three or five bidders bidding on the contract, sometimes on large Government presses.

Mr. MORGAN. Would you not think that for the National Government to make a law that would be an interference in or a supervision

over all the small concerns in large cities would be a great aggravation and a great expense to the Government without any results accomplished?

Mr. BENNETT. Are you referring to this bill?

Mr. MORGAN. This bill is supplementary. This bill includes all corporations and persons doing an interstate commerce business, which you say would include the small concerns. Now, the other bill puts all of you under the supervision of that commission. Then you would open your books to them and they would have the right to take action.

Mr. BENNETT. Well, we are going to object very, very strenuously before anything like that is done, and I think we would rather test the constitutionality of the law before we would open our books, because our competitors are so keen that we can not afford to let any of our competitors see anything inside of our business. Of course, we would obey the law if we had to.

Mr. VOLSTEAD. Assuming that you should eliminate corporations doing business of less than $3,000,000 annually from the operations of a provision like this, would there not be some question as to the constitutionality of the rest of the measure?

Mr. BENNETT. I think there would be a very severe question about it, but, of course, I am not a constitutional lawyer and I would not want to say. I think that it might possibly be a constitutional question.

Mr. VOLSTEAD. Could you not make a distinction provided that distinction was based upon good reasons?

Mr. BENNETT. Yes.

Mr. VOLSTEAD. I presume that a corporation that does not do more than a $1,000,000 worth of business a year might still be such a monopoly as one who does a business of $100,000,000 a year.

Mr. BENNETT. That might be true if it was in a small line. But the reason I would agree to that would be because it would let all of us out. Now, there is another thing that is very serious, and that is in the next section, section 10, page 2, committee bill No. 1: What shall be deemed an attempt to monopolize trade? For any person to make a sale, fix a price, discount, or rebate. You see, that narrows us down to "a person, a sale, a price." Now, I will tell you how we sell presses west of Pittsburgh. Here in the East we can sell our presses by our own agents. We have agents in Philadelphia and New York and in the East, and they do not work for anybody else. West of Pittsburgh the territory is so large that none of us has our own agents and we make a deal with a type foundry, a concern which has to sell accessories to printers. For instance, the Babcock Co. goes to the Barnhart Type Foundry and says, "You are going all through our section. Now, you handle our presses and we will sell you our presses f. o. b. factory in New London at a fixed price, and we will give you an exclusive territory provided you do not sell a similar press." Now, that is the agreement we have been working under for years and years and it has proven satisfactory. Under this bill that would make us liable under the law. The matter of keeping agents out here is very expensive. You can not sell printing presses by mail. That being so, we are prohibited in section 10 from doing our business that way.

Mr. FLOYD. Now, you say you establish an agency?

Mr. BENNETT. Well, the Barnhart Foundry Co. handles all kinds of type and frames for holding type, and all kinds of accessories of a printing shop, and we will go to this Barnhart Co. and say, "Here, west of Pittsburgh, you represent us. You sell Babcock presses and we will give you this territory exclusively. We will not sell a press in that territory. If we get an inquiry we will turn it over to you and you will sell the press; but you are not to sell any other flat-bed press in there. You have got to devote all your interest to our concern." Now, I believe that this section 10 would absolutely prevent that agreement.

Mr. FLOYD. If you sell them to him and he is not your agent then he is a purchaser from you on a contract that he will not deal with anyone else, and the provisions of this bill would undoubtedly reach you on that kind of a deal.

Mr. CARLIN. That is the very thing we are trying to reach.

Mr. BENNETT. Yes; and I think you are wrong in trying to reach such a thing. For instance, the Babcock Co. sells to the Barnhart Co. and the Barnhart Co. sells to the little printers all through the West, because the Barnhart Co. has agencies in Washington, Kansas City, and St. Louis. They can buy and sell small things. Their man can sell a hundred dollars worth of goods and he has paid his way, but our man can not do that. If they get an inquiry for a press, the Barnhart people will do all they can to sell the press, and they know all about the prospective purchaser's credit in the particular town in which they are located. They may give him five years' credit, but we could not do that, because we would not know anything about his credit. Now, what I am telling you is not theoretical. We have found that the best thing is to have a fixed price with the Barnhart Co., f. o. b. our factory, because they know the cost of transportation and they take all that chance, and they can get as much money above our price as the conditions will permit.

Mr. CARLIN. And this bill would prevent you from entering into such a contract?

Mr. BENNETT. Well, but that contract has 10 years to run, and how we are going to get out of it I don't know. I suppose the Barnhart Co. and ourselves will have to occupy adjoining cells. It was a perfectly legal contract when we made it. I would like to know whether the Constitution means anything when it says that contracts shall not be impaired. This is trying to set aside a perfectly legal contract between business men.

Mr. CARLIN. That is true of every criminal statute. It simply makes a crime of something that has heretofore not been a crime.

Mr. BENNETT. Yes; but if you let it be generally known throughout the country that this is a criminal statute you will not have an empty room here. The reason the people are not here is that they do not know about this. You gather together a hundred business men in any lunch room or club and tell them that these bills will hit them and they will laugh at you. I went up to Syracuse the other day and in a smoking car I talked to various men in various lines of business. When I told them about these bills they thought I was crazy, and one German said, "I can not tell what it means, because it has too many words in it." That was when I showed him a copy

of one of the bills. I told him that it might strike him because he was a manufacturer of varnish and sells it all through New York, but he told me that it would not hit him because varnish is an unstable commodity.

Mr. CARLIN. You would perhaps be surprised to know that the greatest opposition has come from gentlemen who want to compel the fixing of prices all the way down to the retailer.

Mr. BENNETT. Yes, sir; but I am not asking you to fix it. I am frank to say that I would make a trip down here every day this week, and my client would pay me a very handsome bonus if I could make you enact such legislation. But I know it would be useless. I have had a little too much experience to bay for the moon, because I know you would not stand for it. As I have already explained, sections 9 and 10 hit our business. I have a client who manufactures umbrellas who would be hit in the same way as we would be, except that he has some fixed price for selling goods. Of course, in poor seasons he will sell at whatever prices he can get, above cost, in order to keep his factory going. Now, he would have to get out a schedule of prices every day in order to keep within this law.

Section 13 provides:

> That any person, firm, corporation, of association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage.

Now, suppose we sold a $10,000 press in St. Louis. Suppose we sold the same press in Kansas City for $9,000. Should our competitor get an injunction against us for quoting such a price? Could the man in St. Louis get an injunction because his plant would be injured by reducing the value of his plant by $1,000? This looks a little bit far-fetched, but what surprises us in the law business is how far-fetched will the law go. A business man will very often have a case which will develop something that we thought would be impossible. It looks to me like it would be possible for any disappointed competitor to get out an injunction against the successful bidder.

Mr. CARLIN. You could not be hurt by the injunction because that section requires him to give bond.

Mr. BENNETT. But suppose he won. Suppose the judge says that is what the law means. Then we would be hurt to the extent of the $1,000, and the $1,000 would hurt us. Of course it would be an irreparable loss, because if we did not make the sale the competitor would make the sale.

There is another thing in our business. We hardly ever make a clean sale. I do not mean that there is anything dirty about the business. I mean that if we sold any one of you gentlemen a new press you would give us back the old press, because there are very few men starting in the business these days. They are nearly all old hands. Whenever you buy a new press you have to give back your old one and you get a discount. There is where you come in with the "discount or rebate." The Miehle Co., the Whitlock Co., and the Babcock Co. might agree that the price would be $3,500 for a press that would ordinarily sell for $3,000. They will not agree together, but they will all fix the price at $3,500. Mr. Jones says, "I have an old Campbell press made 30 years ago. I want to buy a

new press from you, and I want to know how much you will give me for my old one." Now, some man might give him $350 for it, and another man might give him $250, and another might give him $750. Would that be an absolute discount or rebate on the press? Of course they would not want the old press. They would have no use for it. They would take it home and sell it for junk or throw it away, when they might have allowed him $750. They are doing that every day when they make a sale. That is the way they make them.

The New York Times has just bought a plant and put a new press installment in there, and the binding part of that contract was that the man who installed their new plant must take their old plant away exactly as it stands. Under those conditions some of the bidders were prohibited from bidding. They could not handle such a thing. Naturally the man who put in the old plant could handle the old press, and of course he was the one who put in the new press. Was that a discount or was it a rebate, or what? Every one of his competitors would say that he was guilty of accepting a rebate; and being a large deal, they might try to say that he was trying to make a deal with the Times. I would not care if they thought the newspaper was guilty, but the Hoe Co. might be found guilty of what they considered a legitimate deal. Section 10 would prevent the buying back of second-hand presses under any such conditions as those. Section 12 limits this whole business to one sale. One sale across the border would be enough. I think that is getting down pretty small. One sale across the border makes it interstate commerce. My only suggestion to this bill is that it be eliminated by putting in a $3,000,000 limitation or that that section of the bill be eliminated. We can not get any assistance out of it; we are simply innocent bystanders, hit by stray rifle shots intended for the big fellows.

Mr. DANFORTH. How about your customers?

Mr. BENNETT. The Typothetæ, an association of master printers, recently wrote us a letter and asked us to raise the price of our presses so that there would not be so many kikes getting into the business. Of course, we did not do it, although we would have been very glad to do it. Mr. Hearst, in New York, last year, bought a printing press for something like $15,000 or $20,000, a big sextuple press that ran through a 20-page edition at the rate of 90,000 an hour, complete, folded, run out, pasted together, all ready for the boy to put under his arm, where his father, 20 years ago, in California, bought a press from the same maker, that ran through a 16-page edition at the rate of 72,000 an hour, for $40,000. The competition is such and the prices are so low that the business manager of the New York Sun told a friend of mine that he bought a color press some time ago for a very low price, and he said the manufacturer ought to have had $10,000 for it. We do not sell to the National Government twice at the same price. The Government has not bought any presses for some time, though. The Government sends out and asks for bids, and we send in bids, and the lucky man gets it. The next time we send in bids again. The bids are never alike. You look over the Government records and you will be surprised how infrequently the Government buys the same press at the same price. Of course, under this bill we would have to be very careful in bidding with the Government. We would have to fix a price that would stand for all eternity.

Mr. FLOYD. Mr. Bennett, you do not seem to understand that bill as I do. It only relates to the prices that you fix and not to the price that somebody else fixes. You can fix that price high or low, or whatever you choose, but you can not sell to one individual at one price and to another individual at another price. You can cut under the other manufacturers, you can undersell every one of them, provided you maintain the same prices throughout the country.

Mr. BENNETT. Yes.

Mr. FLOYD. You can do that by lowering your price.

Mr. BENNETT. How often can we lower our price?

Mr. FLOYD. As often as you deem proper.

Mr. BENNETT. Then there will not be any fixed price.

Mr. FLOYD. It would be the same all over the country.

Mr. BENNETT. But we could lower it every day.

Mr. FLOYD. Yes, sir; all over the United States.

Mr. CARLIN. You can not lower your price in Washington and raise it in New York on the same day.

Mr. BENNETT. We never sell two printing presses on the same day.

Mr. CARLIN. Then this bill will not affect you.

Mr. BENNETT. If the interpretation of the committee is that we can change our prices every day we are perfectly satisfied, because if we can do it every day why can not we change them every half day, every morning and every afternoon? And if that is done, why not change them every hour?

Mr. CARLIN. You could not do that.

Mr. BENNETT. Why not?

Mr. CARLIN. That would be a ludicrous proposition.

Mr. BENNETT. I think it is ludicrous on the face of it.

Mr. CARLIN. And the statute would be meaningless on the face of it.

Mr. BENNETT. I think it is now, unless you can provide some way of maintaining supervision over us, otherwise the first proposition in the bill is ludicrous, for the reason that it can not be put into successful operation. I do not think you can hit the trusts with it.

Mr. CARLIN. Suppose we should say that you could only do this once a month or once in six months or once a year. Would you like that better?

Mr. BENNETT. No, sir; I would not, but I see that is the only way to make it workable. Of course, if you did it that way, the country would not stand for it. I would not have it that way; no, sir. I am frank to say I would not have this bill hanging over any of the companies I represent, because it is fraught with too much danger. We are treading on too thin ice all the while; we are hampered in our business not from any moral injury but because of the wording of the statute.

Mr. CARLIN. The same complaint was made of the Sherman law, and gentlemen said they did not want to violate the law but they did not know what it meant.

Mr. BENNETT. They are finding it out now.

Mr. CARLIN. That is simply a method of argument adopted by gentlemen who do not want to understand the law and who want to discredit it, and yet, you know, there is no difficulty about understanding the Sherman law.

Mr. BENNETT. I agree with you on that. We agree now that if we fixed our prices at the same price we would be running contrary to the Sherman law.

Mr. FLOYD. You mean that if you and your competitors fixed your prices the same?

Mr. BENNETT. Yes, sir.

Mr. FLOYD. This has no relation to your competitor's prices.

Mr. BENNETT. I am not so sure about that.

Mr. FLOYD. It gives you the right to fix your price higher or lower than the prices of your competitors.

Mr. BENNETT. Yes.

Mr. FLOYD. And maintain them.

Mr. BENNETT. Yes.

Mr. FLOYD. And that would prevent you from selling at one price in one locality and at a different price in another locality. The purpose of this legislation is to prevent you from discriminating among your own customers to the injury and detriment of some other persons.

Mr. BENNETT. Suppose it cost more to sell it in some other place.

Mr. FLOYD. Provision is made for the difference in the cost of transportation.

Mr. BENNETT. Yes; for transportation. But suppose an agent in Chicago sells a press for $3,000. Suppose we send a representative to Kalamazoo once, twice, or three times a year. Suppose we send him five or six times in the course of a year and he finally stays there. Now, competition is keen and if we had a man for five weeks staying in Alabama, for instance, staying at good hotels, and he finally sells a press, we will have to get more for that press than if we had not gone to all that expense. Taking into consideration the conditions surrounding the sale, we would have to change our price. We can not have a fixed price. It is the same way in church organs.

Mr. FLOYD. Now, when you had to send a man to Alabama four or five times, did you sell your press at a higher price or at a lower price?

Mr. BENNETT. We had to. We tried to get a higher price.

Mr. FLOYD. But what did you do?

Mr. BENNETT. It went to the Gauss Co., of Chicago, at $18,000, and they lost about $5,000. If those salesmen had only been wise and got around a table and said, "Don't let any of us bid lower than $25,000," and stuck to it, they would have been all right. The difficulty is that the other fellow might reduce his price, and we would have to reduce ours. All our business is done on bids, written or oral bids. It all depends on little accessories that are thrown in to make an inducement to the buyer, and that would all come in under "discount and rebates." We would have to change all our rules for selling presses.

Mr. FLOYD. And your competitors would have to do the same thing?

Mr. BENNETT. Yes, sir; but it would not work out to the benefit of the consumer, so far as I can see. If it would, then we would get more money. This bill would prevent us from having an agent take an exclusive territory and handle it where we could not sell him the presses beyond a certain price. How we would do business in a large

territory where we could not have agents, I do not know. We have the Barnhart Co. doing business south of Chicago. We have the International Type & Paper Co. doing business for all South America, and they buy their presses f. o. b. New York. How would a company with a total invested capital stock of $1,000,000 cover all that territory personally? They could not, and the only way they can do it is by having agents, and they must have a man who will boost that press as against all other presses.

Mr. FLOYD. Then, if this law was enacted, your competitors would be excluded the same as you would be.

Mr. BENNETT. Oh, then how would we cover South America?

Mr. CARLIN. That is your job.

Mr. BENNETT. That is the German's job. They have already sold six presses in South America. We are paying our men an average of 40 cents, and the Germans are paying 14 cents, and we do not get any consideration under the tariff. This will shut out our foreign business. What is the Government for? Is the Government just to stand up and put spokes in our wheels? We are paying some of our men $6 a day to erect presses.

Mr. CARLIN. The Government is not putting spokes in your wheel, but putting a chain on it to keep your wheels from running recklessly and wild.

Mr. BENNETT. You are putting this kind of a chain, one running from the body down to the wheel. I have tried the chains, and I know what they are; they are brakes. Now, what I am telling you is true. It is the German's business to look after the trade in South America, and he is going to lick us.

Mr. CARLIN. Are you competing in your presses in the foreign market?

Mr. BENNETT. In South America and Australia. The French, English, and Belgian labor is so much lower than ours that we can not meet their competition.

Mr. CARLIN. Are they making your presses?

Mr. BENNETT. Yes, sir; they are making our presses. They came to the world's fair and copied them. They are now selling them from $500 to $1,000 cheaper in Argentina. The Babcock Co. had an offer in the Argentine Republic for a press at $3,000, the same price they gave here. The Germans got the contract, and they installed a Babcock press for $2,000. We did not get the order. There they have got the Babcock press down there, and they only paid $2,000. Our Government does not help us any.

Mr. CARLIN. How could we help you in that case?

Mr. BENNETT. You could not help us. All the Government can do is to hurt us or leave us alone, and they have not apparently any intention of leaving us alone, and that is the reason I am down here. Now, as to paragraph 4 of section 2 of the second bill, I have the same objections that I had to the first bill.

Mr. CARLIN. Mr. Bennett, your doctrine of leave us alone is the doctrine of the highwayman, is it not?

Mr. BENNETT. It would be if we were highwaymen.

Mr. CARLIN. I say you are not, but is not that what the highwayman wants?

Mr. BENNETT. What do you want? Do you want to be left alone? Are you a highwayman?

Mr. CARLIN. Oh, no; I am speaking of the doctrine of the highwayman.

Mr. BENNETT. Yes; but I do not think you ought to refer to us in connection with highwaymen. It is the tendency of this tentative bill to say that we are all guilty first.

Mr. CARLIN. I am talking about your doctrine of let us alone. It is the fundamental doctrine of the highwayman.

Mr. BENNETT. It is the fundamental doctrine of Magna Charta and the fundamental doctrine of the Constitution of the United States, which until recently was considered a very fine thing. We are entitled to life, liberty, and the pursuit of happiness, and to have property without having it seized unless you can show that we are guilty of something. These bills say that we must be searched first, and if you find nothing on us, maybe we are not guilty, and they will search us again. That is why I want to appear before the other committee on the other bill permitting us to be searched and chased all over the United States and served with subpœnas.

Mr. CARLIN. You object to all this legislation, do you not?

Mr. BENNETT. Certainly; why not?

Mr. CARLIN. You object to the Sherman law?

Mr. BENNETT. No, sir; I am absolutely willing to be bound and hog tied by the Sherman law, because that is based upon open competition and fair dealing among men. We are perfectly willing to be bound by it, and the courts seem to have no trouble in finding out what the Sherman law means.

Mr. CARLIN. But if you apply your doctrine of let us alone, what would be your method of doing business?

Mr. BENNETT. Let us alone unless we are guilty.

Mr. CARLIN. But suppose we wiped the Sherman law off the statutes? What would you do then?

Mr. BENNETT. Well, I think the Sherman law is putting into statutory form the old common law, and anything that goes to honesty and fair dealing between men and individuals is fair. We can all be investigated by grand juries after you have found some sore spot. That is why we object to paragraph 4, on page 2, second bill. "Directly or indirectly" is the same as saying "knowingly or unknowingly." The remarks which have gone before apply to this same paragraph. I believe this would absolutely hamper all the business of the companies I represent, and any other companies doing business over a State line. I want to call your attention to section 4 of the second bill, page 3. That is the section Mr. Ryan spoke of. It says:

> That whenever a corporation shall be guilty of the violation of any of the provisions of this act the offense shall be deemed to be that also of the individual directors, officers, and agents of such corporation.

We have the same law in New York State, except the law goes ahead a little bit further and says that this shall not apply to any director who is absent or who votes against it at the meeting. If this means that if any agent of the company goes out and does some unauthorized act—it might mean that—or if any director is liable because some officer does something which has not been referred to the board of directors, yet the board of directors has supervision over it—I do not know, but I think there ought to be something in there limiting it to persons guilty of the acts. Now, I desire to thank you,

gentlemen. My object in coming here was to learn as well as to try to give some information, to try to find out the position of the small businesses in the country. I appreciate the opportunity you have given me, and by your questions you have aided me in finding out the standing of these companies and how they would probably be affected by this legislation.

STATEMENT OF F. A. GOOD, PRESIDENT NEBRASKA LUMBER DEALERS' ASSOCIATION, COWLES, NEBR.

Mr. CARLIN. Please give your name, address, and occupation.

Mr. GOOD. My name is F. A. Good; my address is Cowles, Nebr. I am a retail lumber dealer myself, in a small town, and president of the Nebraska Lumber Dealers' Association.

Mr. Chairman and gentlemen of the committee, I appear before you to-day as the representative of about 400 retail lumber dealers in the State of Nebraska, who own and operate their own yards and keep on hand such supplies of builders' materials and coal as the needs of their several communities seem to warrant.

We feel that if there is a readjustment of the Sherman antitrust law contemplated, that our tradespeople should be heard in a matter that may be of vital importance to their business and also the life and existence of small towns all over our land; and we are lead to believe that in many instances the operation of the said law in the past has followed the lines of least resistance and has proven a menace to small business which was in no way contemplated, and has been skillfully side-stepped by most of those great aggregations of capital, whose regulation and restraint was the sole object of the said bill, or, in other words, the great trusts have been unusually thrifty and the small dealers have seen their business slipping away from them and toward a great centralized market.

We come to you representing a set of men whom we believe more frequently than any other are found to be the leading aggressive men of their community, contributing liberally to churches, charities, good roads, schools, etc., and heavy payers of taxes, rent, and insurance. Also liberal grantors of credit, which frequently amounts to a sum as large as the amount of capital that they have invested in their entire stock, and this is done without any interest returns whatsoever for the money.

Our contention of unfairness to our business in the working out of the Sherman law is that of the possibility of our becoming violators of the said law by the distribution of information through our association to its members; for example, John Jones, a manufacturer, sells to me, a retailer, several cars of lumber; then, either directly or through John Doe at, say, Omaha, he also sells to my customer, the consumer, and at the present time I am safe in saying that the fear of this law's possible scope or interpretation by the courts is so great that no association would dare to inform its members of the bare fact that John Jones was both a wholesale and a retail dealer in lumber.

The business of the retail lumberman is to purchase of the manufacturer of lumber his product in car lots, and to keep this in stock in the towns, supplying the tributary trade at such times as they

may need the same, and in such quantities and under such conditions of payment therefor as the customer's needs may demand. In this assembling of stock for our Nebraska trade, we bring together a variety of woods; for instance, in the ordinary frame building the dimension lumber is fir from the Pacific coast, yellow-pine sheathing and inside finish from the Southern States, white pine for outside finish from Idaho or Wisconsin, and shingles and siding from Washington or Canada.

The experience of good builders is that these woods are the best for the several parts of the building. And, now, if a party in, we will say, Omaha, wishes to sell building materials to the consumer he must do one of the two things, either assemble at Omaha a stock from the widely divergent parts of our country that he may reship to the consumer from, or he must ship from some one mill all of the materials that will enter into the structure.

The first of these methods in no wise eliminates the middle man but removes the business from his local community to a centralized point, in this instance, Omaha; and the latter makes it necessary for the builder to use materials that in good practice are not adapted to the uses to which they will be put, and in either event the customer is not better served; in fact, the service that is rendered from a point 200 miles from the customer, such as exists between my own locality, as it relates to Omaha, or 1,500 miles, as it exists between my own locality, as it relates to the manufacturers, will ever prove more unsatisfactory than service at the door of the consumer.

We call your attention now to the absolute disregard for truth that these trimmers or business pirates practice. For your information we will say that there are many grades of lumber; in white pine, for instance, there exist grades A, B, C, D, and numbers 1, 2, 3, 4, and 5; and in the other woods a somewhat similar list. These grades, by long practice, means much to the manufacturer or retailer of lumber and but little to the average consumer, who almost invariably is not informed on the grade subject.

Let us consider that a customer is a farmer. The expression "No. 1" with him invariably means the best; so that when he finds "No. 1" lumber quoted to him at a less price than his local merchant is quoting on the best in his stock he is led to believe that the home price is too high; and hence orders from the people quoting a less price; and, being unable to correctly grade the stock when it arrives, as we have said, a lower grade than even No. 1 is usually substituted; and if a question is raised as to grades their letter that the stock is their No. 1 lumber and that they do not recognize any other than their own grading rules is expected to be final.

Advertisements of lumber issued from these mail-order people are almost always accompanied by lies of the grossest character, with the evident intent to discredit the home lumber dealer and to make the consumer believe that there is existing a greater lumber trust that is making an exhorbitant profit on the consumer's business; for instance, advertisements are common such as this:

All the lumber for a house like this—picture given—for $490. Your lumberman would charge you $800 for this.

This door, $0.99; your lumber dealer would charge you $2 for the same.

This list of rank untruths might be extended indefinitely, but what we wish to call your attention to is the fact that this is allowed by our

laws or their interpretation; but if our association writes a letter to its members saying that John Jones Co. are retailers of lumber, an exact truth, that the lie stands unafraid; but truth is indicted in our courts.

We believe that the service from the sawmills to the consumer of lumber as conducted at present presents no possibilities of elimination.

Probably over 90 per cent of the lumber dealer's stock in trade is shipped to him directly from the manufacturers with no intervention of any other party whatsoever; and the two profits, the mill's and retailer's, are all the ones that are levied against the material from the forest to the consumer.

It is a probable fact that less than 40 per cent of the lumber used on jobs might possibly be shipped direct from the mill in car lots to the consumer, the other 60 per cent being used in a smaller way so that a local lumber yard must ever be a necessity to the community and also to the manufacturer, for no mill, even if freight rates were not prohibitory, could maintain a local shipping station at the factory caring for trade often 2,000 miles distant, and the establishment of a nearer distributing point would only reestablish a middleman at a point less convenient by far to the consumer than a local concentrating point for the various products immediately at his door.

That no moral right is possessed by a manufacturer to sell to both a retailer and then also to the consumer who is a customer of the retailer is evidenced by the skulking manner that this modern pariah adopts, who advances with outstretched hand to the merchant, saying, "My brother," and then with his concealed hand sticking the knife underneath his fifth rib.

It has been said by many of good authority that publicity is a solution to the great trust question. We do not pretend to know, but of this we are sure, that it is not justice when no effort whatever is made to punish a dealer who publishes false descriptions of his goods and lying allegations about his even unknown competitor while this party so maligned may be indicted for making a statement of truth that John Jones is both a wholesale and retail merchant.

For the past several days I have been in our beautiful Capital City and have wandered exultingly through its majestic halls, gazed at the statues of the men who have immortalized freedom, and read from the inscriptions on the walls the condensed wisdom of the ages. One beautiful mosaic I have found that so nicely depicts the basic principle that should, I feel, underlie all legislation that I call your attention to its apparent motif. Law is depicted as a woman of radiant countenance and wearing the ægis, enthroned upon a dias. She holds a palm branch toward truth with her lilies, peace with an olive branch, and industry with cap and hammer, and a sword is interposed against skulking fraud, discord, and violence.

Mr. CARLIN. The committee has no questions to ask.

Mr. GOOD. In a general way, I just wanted to call attention to an item or two which I have not heretofore referred to, that we, as lumber dealers, feel that the legislation before the committee and Congress has much to do with the interpretation of the laws, and we, wishing to be law-abiding citizens, would like any measure adopted wherein publicity is a feature or the investigation of our organization made a possibility.

I understand that some evidence has been placed before the committee in regard to the difficulties encountered by a dealer who tries to get into the lumber business. That gives rise to suspicions that there is such a thing as a lumber trust, and in respect of my own position, both as to getting into the lumber business and as regards a would-be competitor who would like to get in, I feel it would be of interest to make a simple brief statement. I make the allegation that it is the banker or the financial backing that a man has as to whether or not he secures the support when it is necessary to put him into a business and not the antagonism of the dealer that is already in. No banker will knowingly loan his money for an enterprise which promises disaster; and in most instances, in fact in all of the instances, where I have known of another man trying to get into the lumber business and being restrained, which he alleges was due to the lumber men or the lumber associations' activity, was in every case due to the fact that banking interests refused to advance him the backing that was necessary to carry on his trade with.

I thank you, gentlemen, for the privilege of making this talk to you.

However, I would just like to make this additional statement, that in talking with several Members of Congress and of the Senate here from my own State I found that in every instance they were not aware that the statements which I made in regard to publicity were a fact and that we were subject and liable to criminal prosecution for stating an exact truth in regard to business conditions as they existed.

Mr. Hall, secretary of the association, is also here.

STATEMENT OF E. E. HALL, SECRETARY, NEBRASKA LUMBER DEALERS ASSOCIATION, LINCOLN, NEBR.

Mr. HALL. I will not take up any of your time.

Mr. CARLIN. Mr. Hall, just come up where we can hear you, please.

Mr. HALL. I think I will not take up any of the committee's time. Mr. Good has been over the ground, and I understand it has also been gone over before by other delegations. As Mr. Good has said, we have come some 1,500 miles and have been here several days, we felt we would like to appear before the committee. I thank you for giving us an audience.

Mr. CARLIN. If you have anything you want to say, we will hear you.

Mr. HALL. I have nothing to add to what President Good has already said; I thank you.

Mr. CARLIN. I want to ask you a question about publicity, which these gentlemen want. As I understand it, that was the right to publish a periodical which gave the names of individuals you dealt with?

Mr. HALL. Not necessarily. What we want is to disseminate the information among our membership as to who are our competitors.

Mr. CARLIN. Which, in effect, would be those parties whom you did not want to deal with?

Mr. HALL. We naturally would not want to deal with them if they were competitors of ours.

Mr. CARLIN. Is that the object of the publication?

Mr. HALL. Is it what?

Mr. CARLIN. Is that the object of your publication?

Mr. HALL. The object of our publication was to make a man take one course or the other—either become a retailer or confine himself to the wholesale trade and not be both.

Mr. CARLIN. Then, you published in your circular the firm or corporation or individual who dealt in the wholesale and retail trades?

Mr. HALL. We would like to do that.

Mr. CARLIN. That is what you did do once?

Mr. HALL. We did not do it; we would like to.

Mr. CARLIN. I thought you did have a publication and it was prohibited.

Mr. HALL. No.

Mr. CARLIN Are you not mistaken about that?

Mr. HALL. No, sir.

Mr. CARLIN. Some gentleman made that statement.

Mr. HALL. That is what we would like to do.

Mr. GOOD. We have no national organization or association.

Mr. HALL. We have no national association.

Mr. CARLIN. As the matter stands, that, in aspect, means boycott then?

Mr. HALL. What is that?

Mr. CARLIN. The effect of that would mean boycott.

Mr. HALL. Boycott against a man who was trying to do two-faced business only.

Mr. CARLIN. And you want the privilege of boycotting him?

Mr. HALL. We want the privilege of making him confine his trade either to the wholesale or to the retail business.

Mr. CARLIN. And if he does not, to boycott him?

Mr. HALL. Certainly.

Mr. FLOYD. In other words, your retailers' association wants the privilege of publishing a list of those men who engage both in the wholesale and retail business?

Mr. HALL. That is the idea, exactly.

Mr. FLOYD. And if you can circulate that information about among the members of your association, you are confident that retailers will boycott the man who is doing that?

Mr. HALL. It certainly would. It would be foolish for a man to buy from a wholesaler who is also selling to his own customers. We are trying to meet competition from retailers. We do not fear any competition from retailers, but we can not live in the face of competition by wholesalers who sell to us and also sell to our customers. As Mr. Good has told you, a large proportion of our trade is not of such a character that the customer can purchase, in any event, of the wholesaler. It is absolutely necessary——

Mr. CARLIN. How would the consumer be affected?

Mr. HALL. What is that?

Mr. CARLIN. How would the consumer be affected if you should be given the right you ask for?

Mr. HALL. Oh, so far as my experience goes, he would fare just as well as he does at present.

Mr. CARLIN. There would not be any prospect of him faring any better, would there?

Mr. HALL. I do not get your question.

Mr. CARLIN. Would there be any prospect of him faring any better than he is now?

Mr. HALL. He might fare a good deal worse, under conditions carried to its legitimate conclusion under this Sherman law, because it would carry a large percentage of business to the wholesaler, and in that event the retailer would be obliged, in the nature of things, to get a larger percentage on the remaining share of his business, which is a small business—a business which can not be shipped in carloads. You understand that the lumber business differs from other businesses in this, that in the majority of businesses a man can ship in his stuff locally, whereas in the lumber business in order to make any money or save any money, under any conditions, he must order it by the carload as the dealer does, and get a carload rate on it. About 40 per cent, I imagine, as near as I can estimate, of the business might be purchased by carload lots. In that event the buyer would have more or less of it left on his hands, because it is impossible to make out a bill which fills his exact wants; or he would be short. If there were no lumber yards in his neighborhood and he had to depend on the wholesaler, he would be obliged, at considerable expense and loss of time, to ship his lumber in locally, with a freight rate of perhaps two or three times what the carload rate is and the risk of damage in transit also.

Mr. CARLIN. I think we understand you, Mr. Hall.

Mr. HALL. I thank you, gentlemen.

(Whereupon, at 1.25 p. m., the committee adjourned to meet Tuesday, February 10, 1914, at 10.30 o'clock a. m.)

-25 1914

TRUST LEGISLATION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 8

STATEMENTS OF

SETH LOW AND JOHN BATES CLARK

FEBRUARY 4, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Statements of: Page.
Seth Low, of New York..... 309, 324
John Bates Clark, of New York..... 320, 328

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.
CHARLES C. CARLIN, Virginia.
JOHN C. FLOYD, Arkansas.
ROBERT Y. THOMAS, Jr., Kentucky.
H. GARLAND DUPRÉ, Louisiana.
WALTER I. McCOY, New Jersey.
DANIEL J. McGILLICUDDY, Maine.
JACK BEALL, Texas.
JOSEPH TAGGART, Kansas.
LOUIS FITZHENRY, Illinois.
JOHN F. CAREW, New York.
JOHN B. PETERSON, Indiana.
JOHN J. MITCHELL, Massachusetts.
ANDREW J. VOLSTEAD, Minnesota.
JOHN M. NELSON, Wisconsin.
DICK T. MORGAN, Oklahoma.
HENRY G. DANFORTH, New York.
LEONIDAS C. DYER, Missouri.
GEORGE S. GRAHAM, Pennsylvania.
WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 8.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, February 4, 1914.

The committee met at 10.30 o'clock a. m., Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. The committee will be in order. We have Mr. Seth Low with us this morning, and we will be very glad to hear from him now.

STATEMENT OF MR. SETH LOW, OF NEW YORK CITY.

Mr. Low. Mr. Chairman and gentlemen of the committee, I am here in response to the invitation that has been given to discuss your tentative bill No. 2, a bill—

to include within the meaning of every contract, combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce among the several States or with foreign nations, and within the meaning of the word "monopolize," certain definite offenses, and to prohibit the same.

I confess, Mr. Chairman, a certain feeling that it is not altogether wise to attempt to add definitions to the Sherman law; partly because of the reason that was outlined here last night, that because of the many litigations under it its meaning has become pretty definite already; and partly because we in the Civic Federation, who have been studying this matter for a good while, have come to exactly the same conclusion which was reached in Congress when

the Sherman law was passed, that it is very difficult to define, and that it is better to leave the language of the law in general phrases. I think that Congress, before the Sherman law was passed, discussed very fully the propriety of forbidding this thing and that thing and finally came down to the general language which is now in the law.

Prof. Clark and myself are members of a committee of the National Civic Federation, which has been studying this question for a year or two. We kept certain definitions in our draft bill for a year or more; but finally took them out in order to substitute for definitions the language of the interstate-commerce law, which, as you remember, forbids the railroads from making or giving—

any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality in any respect whatsoever.

Or subjecting—

any particular person, company, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

We think that under the clause a great many unfair practices have been obliterated from railroad practice. Perhaps you recall the report of the Interstate Commerce Commission filed, I think, last week, in regard to the use of sidings and tracks belonging to industrial organizations. They said that they thought these practices amounted to rebating, but whether they did or not, they certainly were an undue or unreasonable preference or advantage in favor of these concerns as against all others. In other words, this practice, which could not have been in mind when the interstate-commerce law was passed, is in the process of being brought to an end under that general language. Therefore, it seems to me that if more is needed than the Sherman law now contains, that is the form in which to embody it in any new bill. I think that if an interstate-trade commission is created, and was given authority to administer that clause, it would be able to put an end to one unfair practice after another in general business.

That leads me to the next thought that I want to express in connection with these definitions. I am especially concerned with the fourth paragraph, which begins on line 17 of page 2 of the bill concerning which I am speaking.

Possibly you remember, gentlemen, that 20 years or more ago we used to have a great many international rifle matches, and in one of those matches the score was very close. The last man to shoot took very careful aim and hit the bull's-eye, but his record did not count because he hit the wrong target. I think that is exactly the mistake with paragraph 4 of this bill. It hits the bull's-eye all right, but I think it hits the wrong target. It is penalizing combinations instead of penalizing unfair practices, or forbidding—if penalizing is not the word—combinations instead of forbidding unfair practices. This is an age of combinations. I remember Mr. Choate saying facetiously not long ago that the only new society he wanted to join was one which would aid in preventing the formation of other new societies. This fourth section is so broadly worded that agreements entirely innocent in themselves, and which, perhaps, have never been in the minds of the framers of this bill, would be forbidden.

I would like to illustrate that proposition along the three lines with which I have had some little intimacy. I have been related to

all of them in rather a detached way, and yet I know something about them. First, from the point of view of the railroads; second, from the point of view of labor unions; and third, from the point of view of farmers. I want to show you, if I can, how seriously that fourth paragraph would affect those different interests and probably in ways that have not been thought of. My acquaintance with the railroad problem is, after all, very superficial. I have merely come in contact with a good many railroad men because of my activities in connection with the bill to create a United States board of mediation and conciliation, which was discussed before this committee, you recall, last summer. But I know that they feel that under this fourth section practices which are approved by the Interstate Commerce Commission and which are really, as they think, essential for their work would probably be forbidden. For instance, the Interstate Commerce Commission passes upon railroad rates. Railroads no longer make rates in combination, but they do confer in advance in regard to rates before they are published and submitted to the Interstate Commerce Commission for consideration. They fear that that would be impossible under this paragraph, and that it would be impossible to conduct the railroads' business in any other way. They do not want to enter into agreements with each other which are forbidden by the Sherman law; but they want the privilege of discussing in advance the rate from New York to Chicago, for example, so that the different lines that are competing with each other may publish tariffs that the Interstate Commerce Commission can pass upon readily. I only refer to that as opening up a line of inquiry to your committee which is quite important, and I am quite sure the railroads themselves will develop it amply.

When it comes to the effect of this definition upon labor unions I think you are confronted with a situation of the utmost consequence to the welfare of our people. Let me read that fourth proviso:

> Fourth. To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

Now, how does that bear upon the policy of collective bargaining on behalf of labor unions? That certainly is an agreement to prevent free and unrestricted competition among themselves on the subject of wages, and that is reflected directly in the price of the article that is produced; and I should think that definition, if it stands, would make it absolutely unlawful for organized labor to protect its interests by uniting together in the matter of securing better wages and better hours of work. It seems to me that in considering the relation of labor unions to the Sherman law there is a very broad distinction which must be recognized, unless we are to drift into a situation that will be full of embarrassment to the country.

Mr. CARLIN. May I ask you a question right there?

Mr. LOW. Yes; certainly.

Mr. CARLIN. We have pending before this committee at this time a bill known as the Bartlett bill, which expressly exempts labor

unions from the operation of the Sherman law and also agricultural and horticultural associations. Are you familiar with that bill?

Mr. Low. No, sir; I am not. Of course, if you take labor unions and farmers out from under the law what I may say would have no application in those cases.

Mr. CARLIN. What I am driving at is this: Do you favor doing that?

Mr. Low. I want to say in regard to the labor unions, which I would like to finish with before I take up the farmers' side of it—which I shall come to later—that I favor absolutely taking out from the law—if it is there—any doubt whatever as to the right of laboring men to combine for the sake of shortening hours, improving wages, and the conditions of labor; for collective bargaining as to these things, if you please. But if labor enters into the field of boycotting, as it sometimes does, or has done in the past, which is a direct interference with interstate trade, then I think the law forbidding restraint of trade should apply. I do not think that the law should permit labor to interfere in that way with interstate trade any more than it permits anybody else to do so. Take, for example, the Danbury hat case, which is a very notable case in labor circles. That was a case in which the different branches of the American Federation of Labor pursued those hats all over the country; they not only attempted to prevent their own membership from buying those hats, but they went into the Pacific States and other States and they said to dealers who bought those hats, and to second, third, fourth, and fifth parties, "You can not have our trade if you handle those hats at all."

Now, that, I think you can perceive, is a direct interference with interstate trade; it was so held to be by the Supreme Court of the United States. I do not think that labor, because it is labor, has any right to do that. If you recall, the Anthracite Mine Commission discussed that question of the boycott, and they differentiated between what they called the direct boycott and the secondary boycott. They said that it probably was legitimate, in their judgment, for the members of a union to decline to buy of anybody that they were dissatisfied with; that they could do it themselves as members of a union as properly as they might do it as individuals; but that when it came to the secondary boycott and they pursued the merchandise beyond the limits of the original quarrel they were entering a field that was not only improper but unlawful.

Mr. CARLIN. If you take exception to the fourth section just tell us how you think the thing could be accomplished.

Mr. Low. I do not think I should use the fourth section at all. I think that you are getting into trouble that you can not foresee. I am simply illustrating what the effect would be in directions that I happen to know something about. On the other hand, let me show you the vital importance of this question on the other side. I look upon a corporation as a union of stockholders; and that they form the corporation for the purpose of collective bargaining through officials of their own choice. I do not for the life of me see why labor should not have the same privilege of combining for collective bargaining that the stockholders of a corporation have. But that very right is in question under the Sherman law at the present time.

Some of you have heard of the so-called protocol in New York City. It was an arrangement made at the end of a long strike between the shirt-waist manufacturers, or cloak manufacturers, and their employees providing for arbitration between the employers and shirt makers, and as a part of the arrangement there is a board of appeals. Under that protocol for two years or more industrial peace has been maintained in a trade that before was constantly in trouble; and not only industrial peace has been maintained, but the conditions of pay for these women workers and the conditions under which they labor have been greatly improved. Yet an independent manufacturer, who is not a party to the arrangement, has begun a suit under the Sherman antitrust law as it stands to-day to test the legality of the protocol under that law. It seems to me that labor ought to be able to do just what stockholders are entitled to do in forming a corporation. They ought to be able to unite and combine for the purpose of collective bargaining as to everything affecting their wages, hours, and conditions of employment.

The CHAIRMAN. I do not want to interrupt, Mr. Low, but I would like to have you tell us what is being done or sought to be done under that protocol.

Mr. LOW. I have not read the document for a very long time, Mr. Chairman, and I am not sure that I can speak with entire accuracy. But it is an agreement between a great body of cloak manufacturers and shirt-waist manufacturers with the unions of workers, by which they agree, under certain regulations set out in the protocol, to employ not members of the union only but to give them the first chance. Then the organizations representing the laborers agree with the manufacturers who are parties to the protocol to establish boards of arbitration to pass on all disputes. The protocol further provides that if this primary board of mediation and arbitration fails to settle the dispute there shall be an appeal to a small board of which Mr. Brandeis, as I recollect, is one of the members. Under that protocol, as I say, not only have wages been increased for a large body of women who were very poorly paid, but the conditions of work and labor have been immensely improved. It would be, in my judgment, and, I think, in the judgment of almost everybody in New York City who knows anything about it, a most profound misfortune if that sort of an agreement were to be declared unlawful. As I said, it is being questioned by an independent manufacturer who is not a party to the protocol, under the Sherman law as it stands, without any regard to these definitions; but, if these definitions are adopted, I feel absolutely certain that that effort at collective bargaining, and all others, would fall under the condemnation of the law. It seems to me that this country can not afford to permit capital to combine and then say to labor, "You can not combine in order, with your united strength, to negotiate with capital as to what wages shall be paid, as to the hours of labor, and the conditions under which work shall be done." Yet all of those things do limit competition among themselves; they do affect wages; they do affect the cost of things; and I think that this definition would make unlawful every movement of that kind.

Now, if I may, I would like to take up the farm side of the proposition, and in order that you may perfectly understand——

The CHAIRMAN (interposing). Mr. Low, before you go into that, I would like to call your attention to the bill which was introduced in the House by Mr. Bartlett on April 7, 1913. It is H. R. 1873 and is entitled, "A bill to make lawful certain agreements between employees and laborers, and persons engaged in agriculture or horticulture, and to limit the issuing of injunctions in certain cases, and for other purposes." I would like to have your views in respect to that measure.

Mr. Low. Mr. Chairman, I have never seen this bill, and it would be very difficult for me to discuss it offhand. If you please, I will take it home with me and write you my impressions of the bill; or, with your permission, I will continue the presentation of my views from the farmers' standpoint; and if you will allow my friend, Mr. Clark, to be heard after I have finished I will look over this bill, and, perhaps, later on I can give you my views on the bill. Will that be agreable to you?

The CHAIRMAN. Yes; I suppose that will be satisfactory to the committee.

Mr. Low. For the last seven years or more I have been carrying on a farm at Bedford Hills, in New York, because I wanted to come in contact with the agricultural and farming problems of the country. I have succeeded in making that farm more than self-sustaining. I do not say that it pays the interest on all the investments in my home or even in the farm buildings, but it more than pays its expenses; it pays a part of my taxes and other expenses up there. In doing that I very soon became aware of what, I think, is the fundamental problem of the farmer. I am speaking now of the small farmer; it does not affect me at all or other men with capital. But the fundamental problem of the farmer, certainly in the eastern part of the country, and, I suspect, more or less all over the Union, is this: That he buys at retail and sells at wholesale. He has to pay retail prices for everything he gets and then has to take wholesale prices for what he sells. I submit to the committee that there is not another business in the country that can do that. Imagine what would happen to any manufacturer, or any railroad, if they had to pay retail prices for coal and everything that they purchased, and then had to sell their product at the wholesale price of the day. That is the problem with which the farmer is confronted. That was the problem that confronted Denmark and all the European countries. In Europe, where the pressure has been greater, they have solved it through cooperation. They form cooperative societies which have two objects. In the first place, they want to buy together so as to get things at wholesale rates instead of at retail rates; then they want to sell together, so that they can get the benefit of businesslike care in the handling of their products.

Mr. CARLIN. How has that affected the consumer?

Mr. Low. The consumer does the same thing; he combines to buy direct and at wholesale. As I was going to say to you, however, these cooperative associations on the part of consumers would be absolutely forbidden under this proposed law. The details of cooperation are a little different in almost every country. England is especially notable for these cooperative associations of consumers.

They were founded in Rochdale 50 or 60 years ago, and they there have become enormous. They have cooperative associations for purchasing in common in every little place. Those societies are organized through a general society, and that general society does its own manufacturing; it has grown to be so large that it maintains its own steamship line; and I think I am correct in saying that its annual turnover is hundreds of millions of pounds. Now, what I want to point out is that those people do not combine, either the consumers or the farmers—for the purpose of monopoly. Not a single cooperative association aims at monopoly; it aims at something very different. What it wants to do is to enable the small farmer to buy his plow, to buy his fertilizer, and buy his seed at prices that a man with capital has to pay and at no higher prices. The members agree to give all of their business to the cooperative association, otherwise that association does not know on what scale it can operate nor what expense it can carry. As I see it, under this section 4, that would be absolutely impossible.

Then these cooperative associations perform another function for the farmers. You remember the late Seaman A. Knapp, of the Agricultural Department, who did so much to spread the knowledge of better farming, especially throughout the South.

The CHAIRMAN. You mean the father of the farm demonstration work?

Mr. LOW. Yes; the father of that movement. He used to say that farming is "one part science, three parts art, and four parts business." Now, there are very few men who can combine those different parts effectively. It is not so hard for a farmer to have the science he must have, nor to get the art that he must have; but to add to these the business qualifications that lead to success is an immensely difficult thing, and that is one very great reason why farmers get such small incomes. But the cooperative association carries on the business side of his affairs for the farmer. You take the cooperative associations for eggs in Denmark, for instance. The farmers give all of their eggs to this association, and the first thing the association does is to create a standard. They say to the farmer, "We will not take any old eggs you have; we want eggs that will candle free from defects." After a week or two the farmer understands that, and only good eggs are sent to that association.

Then the scale upon which they operate is so great that they can employ the most skilled expert in the disposition of eggs that Denmark can command. They grade their eggs; they keep in contact with wholesale markets everywhere; and they sell on a great scale. The result has been that Denmark has risen, within 50 years, from a country that was on the brink of despair into the most prosperous country of farmers to be found on the face of the globe. They have actually captured the London market for many things; and now Ireland by the same process is doing the same thing. I assure you, gentlemen, that if you want the greatest possible agricultural production kept up in this country, you have got to make it possible for our farmers to learn how to do that thing and to permit them to do it with the utmost possible freedom. The State of New York only last year passed a law especially authorizing cooperative associations: but this paragraph would make it absolutely impossible; that law would be a dead letter on the statute books. I do not

think you at all realize the injury that would be done to the country if these definitions make such things impossible. I am only illustrating how far these definitions go in regard to the lines I know something about; but I imagine, if you come in contact with men who know about other lines, you will be apt to find that they are of the same opinion, and that it is a great deal safer to stand on the Sherman law alone with its general phraseology. Take, in addition, if you like, the general phraseology from the interstate commerce act which I quoted, which does not aim at combinations per se, but at unfair practices, for that is the real target. I believe in that way you will accomplish very much better results.

Now, in order that what I have said to you may not be misunderstood, I want to say further that besides carrying on my own farm I have organized among my neighbors a cooperative association. We call it the Bedford Farmers' Cooperative Association. I am president of it. Five of us began by putting in $400. We now have 146 members, with a capital of $25,000. I should suppose that no fewer than 100 men have less than $100 worth of stock. You can see we are not monopolizing anything. On the other hand, we have created a competition which did not exist. Now, this bill would not affect that association at all, and for this reason: The region where I am is a suburban region, and many of the farms are owned by people, like myself, who live a part of the year in the city; and we do not want to make it impossible for the tradespeople to maintain their stores and to carry on merchandising as they used to do. Therefore we do not ask, and have never asked, our members to give all of their business to this cooperative association, and they do not do so. All we are anxious to do is to have a steadying effect upon prices there, such as the Erie Canal for so many years had in New York State.

Mr. CARLIN. The illustrations you have given relate almost entirely to cooperative associations that are intrastate in their operations, and this paragraph would only affect, if at all, such as would engage in interstate commerce.

Mr. LOW. I beg your pardon, but I can not imagine a cooperative association that would not have to buy fertilizers outside of the State, or that would not have to buy seeds outside of the State, or that would not have to buy agricultural implements outside of the State. There is not one of them that could buy all of those things within the State.

Mr. CARLIN. But this paragraph would not prevent them from buying: it is the selling that would be affected.

Mr. LOW. But this says:

> Undertake to prevent a free and unrestricted competition among themselves.

Mr. MCCOY. Is there not an association on the Eastern Shore of Maryland which has for its purpose the selling of goods in all the markets of the East?

Mr. LOW. I think very likely there is such an association.

Mr. MCCOY. I remember seeing in a magazine a description of the operations of that farmers' organization, that if the prices are too low in New York, due to an oversupply of any commodity, the central organization is so geared as to find out that fact and it does not ship to New York but ships to Chicago.

Mr. Low. That is it precisely.

Mr. THOMAS. In Kentucky we have a cooperative law in reference to tobacco, by which the farmers are permitted to pool their tobacco and sell to an agent. They sell that tobacco all over the world, and since the passage of that law the price of tobacco is nearly as high again as it was; the farmers get nearly as much again for their tobacco as they did.

Mr. Low. I do not think that could be continued to be done under these definitions.

Mr. THOMAS. I do not either.

Mr. Low. That is my point. I think that these definitions have such a wide reach that this committee might spend a year before they learned the effect they would have. They might have an effect that you would never think of.

Mr. NELSON. You have dealt largely with labor and farmers' organizations in the cases you have mentioned. Have you mentioned any organization of capital that would be injured?

Mr. Low. I spoke of the railroads and the embarrassment that would be likely to be placed in their path, which I think they will develop themselves.

Mr. NELSON. Have you anything in mind outside of the railroads?

Mr. Low. No. I only speak of the things I happen to be familiar with. I have not been in business for a great many years, either as a director or engaged in it, so that I am not able to follow the matter further. But I hope I have succeeded in showing you the immense importance of these definitions, and the further fact that they will have an effect that nobody has thought of in framing that language. I think the unrecognized and unrecognizable effects are so serious that that language ought not to be kept in the bill.

Mr. MORGAN. Mr. Low, I would like to call your attention to bill H. R. 1890. In that volume of bills and resolutions relating to trusts you will find it on page 85. That is a bill which was introduced by myself, and I think that sections 4 and 5, on pages 86 and 87, are largely along the line suggested in the beginning of your statement, relative to the provision in the interstate-commerce act for making a general definition of practices that are unreasonable or unjust. I will read the sections to you and wish you would glance over them as I read:

SEC. 4. That every practice, method, means, system, policy, device, scheme, or contrivance used by any corporation subject to the provisions of this act in conducting its business, or in the management, control, regulation, promotion, or extension thereof shall be just, fair, and reasonable and not contrary to public policy or dangerous to the public welfare, and every corporation subject to the provisions of this act in the conduct of its business is hereby prohibited from engaging in any practice or from using any means, method, or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance whatsoever that is unjust, unfair, or unreasonable, or that is contrary to public policy or dangerous to the public welfare, and every act or thing in this section prohibited is hereby declared to be unlawful.

SEC. 5. That every corporation subject to the provisions of this act shall deal justly and fairly with competitors and the public, and it shall be unlawful for any such corporation to grant to any person or persons any special privilege or advantage which shall be unjust and unfair to others, or unjustly and unreasonably discriminatory against others, or to enter into any special contract, agreement, or arrangement with any person or persons which shall be unjustly and unreasonably discriminatory against others, or which shall give to such person or persons an unfair and unjust advantage over others, or

that shall give to the people of any locality or section of the country any unfair, unjust, or unreasonable advantage over the people of any other locality or section of the country, or that shall be contrary to public policy or dangerous to the public welfare, and any and all the acts or things in this section declared to be unlawful are hereby prohibited.

Mr. Low. I have done so, and as far as I can judge from a rapid reading of those sections they are on the same line as the provision I read in the beginning of my remarks, and I think much to be preferred over section 4, which I have been discussing. The only observation I have to make is that I do not think that they go one particle beyond this phrase in the interstate commerce law, and the interstate commerce language has been defined in the courts; and, therefore, if you adopt this language you will know pretty well what you are doing. If you adopt the language of the bill which I have been discussing I do not think you will know at all what you are doing. I think you will simply start a great deal of litigation to find out what your definitions mean.

Mr. MORGAN. Your idea is that you would adopt language similar to the language contained in the interstate commerce act, which attempts to define practices which are unduly discriminatory, and then leave it to the commission or the Department of Justice to administer it?

Mr. Low. That is my idea; yes. I think that system would work perfectly, and then you could deal directly with the cutting out of unfair business practices.

Mr. CAREW. You think the Sherman law is pretty nearly sufficient as it is?

Mr. Low. I think——

Mr. CAREW (interposing). Do you think the recent construction is correct?

Mr. Low. You mean as to the light of reason?

Mr. CAREW. Yes.

Mr. Low. I do. There is no theory so perfect that in its application to human affairs it does not have to be modified; and it seems to me it would be impossible on a subject like this to pass any law which the courts must not administer in the light of reason. Otherwise we would be living in a world which, perhaps, Mr. Dooley correctly described when he said he hoped the time would come that it would be "possible to distinguish between an American business man and a burglar otherwise than by thumb prints." I think everything human must be administered in the light of reason, and I think that applies to laws as well as to every other human contract.

Mr. MORGAN. What is your view as to whether or not some governmental board or authority should be permitted to approve certain trade agreements before they are entered into or become valid? What do you think about the importance of that to the business interests of the country?

Mr. Low. I think it is very important; and in speaking yesterday on the interstate-trade commission bill I pointed out, in connection with natural products, like coal and timber, that that is not only desirable, but that it is of the utmost consequence. In two addresses made at the last annual meeting of the National Civic Federation it was pointed out that in the coal mines only 40 per cent of the coal in the seam is taken out under existing conditions, because the oper-

ators are unable to agree as to the price of coal at the pit's mouth, and therefore the prices are much lower than they ought to be in order to permit a payment to the miners of a large enough sum to justify them in working on coal that is difficult to get out. Europe has been all through that. It was exactly the same in Belgium, France, and Germany. A few years ago a large portion of their coal was not being mined, and for the same reason the protection of life and limb was very inadequate. They have since adopted a policy of permitting trade agreements under Government regulation, and the result is that they now get out all the coal in the mine and have fewer accidents to the miners. I think that is a thing we ought to do, and do as quickly as public opinion can be brought to sustain it. I think that in the matter of coal mining and in the matter of forestry we are pursuing a policy that makes low prices to-day at the expense of the people who are to come after us; they will have to pay much more than they ought to pay.

Let me say one word about the forestry situation. When I was last in Germany I talked with an American lady who is the widow of a Prussian who had a large estate in Silesia, which she is now carrying on. She told me that in that part of Prussia the estates are very large—30,000 or 40,000 acres—and she said that in an estate of 40,000 acres 4,000 acres would be given up to timber, to trees, and that the 4,000 acres would be divided into 100 plats of 40 acres each. One plat of 40 acres, she said, would be cut down at the end of the hundredth year, one plat of 40 acres would be planted each year, and every five years the trees would be thinned out. She said, "I have planted my 40 acres this year, and I know as well as I know anything about the future that those trees will grow for 100 years, and that at the end of the hundredth year they will be cut down." In that way Prussia and other countries that have adopted those methods are continually replenishing their supply of timber. In Baden-Baden I asked about the Black Forest—how that was controlled and owned. I was told that part of it belonged to the State of Baden, another part to the city of Baden-Baden, and that another part was privately owned. They told me that the parts owned by the State, by the city, and by private owners were administered under laws laid down by the State, "because," they said, "if a private owner cuts down two or three trees in the middle of his holding that lets in the wind and immediately the wind does damage all through the forest."

In other words, it is a recognition of the fact that the only way to get proper forestry is through Government regulation. Of course, I appreciate the difficulty in our country growing out of our Federal system. I suppose Congress could only legislate in regard to the forests which are still held by the Nation; but that does not forbid Congress from giving a good example. The habit of uniform State legislation is growing and can be developed, and if Congress will set a good example in these matters and will permit trade agreements, under Government regulation, a great deal can be done in the public interest. If you undertake to permit trade agreements, I do not see yet how you are going to stop short of fixing prices, and I shrink from that in its application to general business, but I do not see any objection when it relates to a natural product like coal, iron,

or wood. Coal and iron we can not reproduce; wood we can reproduce, but only very slowly; and it seems to me we ought to put all of those matters in a class by themselves. I would very greatly like to see this trade commission, if one is created, authorized to permit trade agreements relating to those subjects, and to regulate them, and to regulate prices, if you please, in connection with them. Beyond that I do not see my way to go at the moment.

This forest question is a very vital one. Some years ago I remember a public man saying to me that he had been asked by a great body of owners, men who owned contiguous stretches of forest land, about the conduct of their business. They said, "We want to conduct our forests in harmony with the most practical methods of modern forestry; none of us can do it alone; together we can do a great deal. Are we at liberty to enter into an agreement to do that together?" They said, "Under the Sherman law can we do it?" My friend said to them, "I can not tell you, and no other living man can tell you." This was years ago, before there had been so many decisions. He said, "You must do it at your own risk; but 10 years from now you may be put in jail for making a mistake as to the meaning of the law." I think those questions are of very vital importance to the United States of to-morrow. What is really taking place is that we are getting coal, iron, and wood cheaper to-day than we should, and to-morrow is going to pay more for it. And the great wastefulness of it is dreadful. As I have said to you in two addresses made at our annual meeting the statement was made that 40 per cent of the coal in every mine in the country is not now mined, and it is permanently lost because it is not economical to go back and get it.

The CHAIRMAN. We would be very glad if you would examine the Bartlett bill, to which I have called your attention, and let us hear from you on that.

Mr. LOW. I will.

The CHAIRMAN. We have with us Prof. Clark, of Columbia University.

STATEMENT OF JOHN BATES CLARK, PROFESSOR OF ECONOMICS, COLUMBIA UNIVERSITY.

Prof. CLARK. Mr. Chairman and gentlement of the committee, what I have to say will be said briefly and will have to do altogether with the economic side of the problem. I am not competent to discuss it on the legal side; I must defer to lawyers in that region. All that economics ought to be able to do is to point out what ends it is necessary to attain, and then hand over to lawyers and lawmakers the method of attaining them.

It was a very great delight to discover in the series of bills which have recently been presented a purpose which, to the best of my belief, is in absolute harmony with the requirements of economics, with present conditions and economic tendencies; and the question which arose in my mind had to do with the method of attaining the ends. The problem in all such legislation is, on the one hand, whether more is attempted than can possibly be attained or, perhaps, more than ought to be attained; or whether, on the other hand,

the effort not to ask too much and fail results in asking too little and failing on the other side.

Now, I take it that the object of intelligent men is to deal with monopolies in the making and not to wait until they are fully made and try to unmake them. That may be necessary if they have already been made on a large scale; but it is a very unsatisfactory and difficult process, with uncertain results; and it will not be necessary in the future if we deal with monopolies in the process of development. I take it that the object of breaking up trusts into fragments—if it succeeds and if it leaves effective competition behind it—is to do something that will never have to be done again, since it will have been done once for all. The later work will be one of prevention.

Now, there are two ways, as I can see, by which this problem of dealing with the trusts in the making may be approached, and both are legitimate; but one is enormously more important than the other.

The more important one consists in identifying monopolistic acts and putting an end to them; the other is dealing with combination as such without special reference to the means by which it is brought about. In attacking the process of creating a monopoly you may possibly still have monopoly introduced—that is, you may not include within the prohibitions of the law all the means of repressing competition that there are and you may have a trust or monopoly as a consequence. It is necessary, therefore, to deal with a combination that has gone to the length of a monopoly without reference to the question how it was created. Nevertheless that will be a relatively simple problem if identifying and preventing monopoly in the making proves successful.

Now, history has something to say as to attacking combinations as such. Certain old English laws have fallen into forgetfulness and are difficult to identify at present; nevertheless at the time when manufacturing business was conducted in guilds and in very small shops with a master workman, a journeyman, an apprentice or two and now and then two or three hired workmen there were laws which forbade partnerships. Under those conditions the law did forbid all combinations of the master workmen on the ground that it extinguished competition between those who formed the partnerships and without reference to the question whether any essential harm was done by it. It was discovered at once that if the partnerships competed vigorously with other partnerships no essential harm was done, and that the public was adequately protected. It was discovered in due time that in many instances the competition which took place between the larger units was more vigorous and afforded a better type of protection for the public than did the competition which existed between the master workmen. The real distinction, therefore, which the law needed to draw was between that amount of partnership building which would sacrifice the interests of the public by creating a monopoly—by extinguishing competition outside of the partnership—and that which did not do it at all but left competition in full vigor. And the laws became a dead letter. They have stood on the statute books for centuries without having any effect or having any attention paid to them.

There are some very familiar and well-known ways in which trusts can grow to the proportions of a monopoly; and, without attempting

to recite them at all, I will say that there are two which are so familiar that they stand quite in the foreground in the public mind. One is local competition—cutthroat competition in a limited territory, where a rival is working, accompanied by a sustaining of prices elsewhere; and the other is what used to be known as the factor's agreement; that is, an agreement not to sell a product to anybody who will buy a similar product from anyone else. Now, the working of that may, perhaps, be illustrated by a hypothetical case, which resembles real cases so extremely well that it is worth while to introduce it. Suppose there is a manufacturing concern operating in about three States; there is a trust producing a similar product operating all over the country and in foreign countries. In addition to having a larger area of operation it has a larger variety of products. The small competitor has only one kind of product and the trust has 20 kinds of products. It could almost afford, if necessary, to give away the one kind on a large scale, if it were necessary to carry out its purpose and acquire a complete monopoly. Now, under those conditions, the trust has two possible ways of easily crushing the local competitor. One is to enter his territory with cutthroat competition and make it impossible for him to sell his product at a rate that will pay the cost; the other is to refuse to sell any of the trust-made products to the rival's customers and so bring about a boycott of the independent producer by the merchants who have been handling his products.

Let us suppose it does the latter. Suppose it sends its agents to the customers of the independent producer and gives them notice that if they buy any more from the local producer they can not have any of the trust-made products, which they need to have in order to conduct a successful mercantile business. That plan will produce a more immediate effect on the local producer and will be done with even less cost to the combination than the former method of cutthroat competition. It is cheaper and quicker in some cases. In some cases it is not as sure as the other, and the other has to be resorted to. Now, I should not have a particle of objection, from a theoretical and economic point of view, to the making of independent definitions of those things and forbidding them, provided I was satisfied it would not be necessary to bring suits in order to secure an interpretation of the language of the new statute. The language of the interstate-commerce law might suffice, though that, I suppose, would be introducing it in a new sphere of operation. Nevertheless it has been construed and, perhaps, would be all that is necessary. If it were not all that is necessary it would be proper to introduce other terms, provided they were clear and were not terms that are so totally new as to require suits at law for giving them fixity of meaning.

The problem I would like to raise is whether, under the Sherman law as it stands and the construction that is now put upon it by the courts, that local competitor, in the hypothetical case I mentioned, could bring the trust to terms, or whether he would find it cheaper and better to leave the field. The latter has been the history of a great many similar cases. They have not been able to resist. Some have struggled on, lost a great deal in the struggle and then yielded; some have yielded at once and saved that loss by accepting industrial extinction. Where the conditions are as perfect as they would be

in the hypothetical case I have supposed the question is presented whether the interstate commerce law and the Sherman law—if the language of the interstate commerce law were made to apply to the case—would be sufficient to enable that man easily to bring an action that would at once restrain the trust from doing what it was doing, and so give him adequate protection and enable him to go on in safety in his business. If it would, that is all that is needed; and it is a lawyer's question whether it would or not. I am not going into that legal problem, but I do know this: Unless something in the law will accomplish exactly that result and enable a person who is confronted with such a condition as the one described to get redress quickly and cheaply, and not be forced to wait for a complete monopoly to grow up before taking action, we shall have very troublous times.

Mr. CARLIN. I want to call your attention to page 6, and ask you to look at section 13, which appears on that page, with a view to having you read it and tell the committee your opinion of it.

Prof. CLARK. That section, which I had read before, struck me as meeting the case which I raised.

Mr. CARLIN. Now, I wish you would turn back to section 10. I think you will find that we have covered there another idea which you have advanced.

Prof. CLARK. I may say that I think my honored predecessor, the chairman of the committee of the National Civic Federation, will agree with me that that particular definition was the one we held longest and attached most value to in our own bill, but that we took it out in deference to the view held by a majority of the committee that it would not be needed in connection with the phraseology that we afterwards used.

Mr. CARLIN. That section expresses your idea?

Prof. CLARK. Yes, sir; absolutely on that point.

Mr. CAREW. You approve of that?

Prof. CLARK. I certainly do.

Mr. MORGAN. Mr. Low, who preceded you, said that you would have something to say with reference to excepting farmers and agricultural associations from the operation of the law.

Prof. CLARK. Personally, I entirely agree with Mr. Low in that particular. I think that something must make it perfectly clear that the combination which we forbid is not a combination of that kind. A law would not be very likely to affect the farmers if the operation of it were such as to take effect only where a monopoly, either national or local, were in the process of building up. However, it is entirely possible to do the thing which I understand is pending, namely, introduce a bill to except them in terms.

Mr. MORGAN. Would you apply that to labor organizations as well?

Prof. CLARK. In so far as the labor unions, of which Mr. Low spoke are concerned, I certainly would. I do not happen to believe in the secondary boycott any more than Mr. Low does. I was going to say that, with regard to mere combination, the law has historically worked from the side of opposition to union itself rather than from that of opposition to unfair practices leading to sinister kind of union, and has encountered very grave difficulties for that reason.

Mr. CAREW. Do you not think there is great danger that the definition in section 10, at the bottom of page 4, might be misapplied? Do you not think that a great many men indulge in those practices who by no means approach a monopoly in any degree?

Prof. CLARK. I am not able to say how many such persons do not have some sort of monopoly in view, local or general.

Mr. CAREW. If my butcher says to me, "I will give you cheaper meat if you buy all your meat from me," would not that fall within that definition?

Prof. CLARK. I should say it would, but I should also think——

Mr. CAREW (interposing). Do you think that such conduct on the part of my butcher is to be condemned?

Prof. CLARK. I was about to say, in another connection, something which applies to this. We have got to apply a distinction, which is akin to the distinction made by the courts under the rule of reason.

Mr. CAREW. Then you think the Sherman law, as now construed by the courts, is sufficient in that regard?

Prof. CLARK. To that broad question I should not be willing to answer "Yes." I think that such an addition to the efficiency of the Sherman law as is contemplated by the major portion of these bills is eminently desirable.

Mr. CAREW. Is not the necessity for these definitions to a large extent done away with by the new construction of the Sherman law—that it condemns only things which are unreasonable and undue?

Prof. CLARK. I would not care to say "Yes" to the question if put even as broadly as this; but I think——

Mr. MCCOY (interposing). Are you familiar with the contention of Mr. Reed, which appeared in the current number of the Atlantic Monthly, which is, as I understand, to the effect that it is only because of corporate powers as now granted by the various States that monopoly is possible, and in that connection I would call attention to Senator Williams's bill, which is on page 459 of this volume; a bill which, I understand, Mr. Reed drew and which Senator Williams approves?

ADDITIONAL STATEMENT OF MR. SETH LOW.

Mr. LOW. Mr. Chairman, may I interrupt one moment? I want to catch the 12.30 train if I can, and my friend, Mr. Clark, is able to stay as long as you want him. May I ask to be permitted to speak about this bill you referred to me, interrupting Mr. Clark for a moment?

The CHAIRMAN. Yes.

Mr. LOW. I have looked over this bill of Mr. Bartlett's very hurriedly, Mr. Chairman, and I am perfectly in sympathy with the first six lines: "That it shall not be unlawful for persons employed or seeking employment to enter into any arrangement, agreements, or combinations with the view of lessening the hours of labor or of increasing the wages or of bettering their condition." I think that ought to be the law of the land. This question in regard to horticultural and agricultural combinations, it seems to me, could better be expressed in another way; that is, in recognizing the propriety of cooperative associations for farmers, because I do not think we want to establish classes in the country, where some Americans have

rights that all Americans have not. I think you would accomplish what is intended, by saying in the law that nothing shall prevent the formation of cooperative associations on the part of farmers for the purpose of buying more cheaply and of selling their products to better advantage.

In regard to the use of injunctions in labor disputes, I am not a lawyer, and I hesitate to say anything more than this: That I think the writ of injunction in the past has sometimes been abused in labor strikes. I think it has been given a wide reach that goes far beyond what is proper in many cases.

Mr. BARTLETT. With reference to the criticism of the first section, I will say that that exact language was taken from an amendment offered by Senator George, and also by Senators Sherman and Aldrich, in 1890, to the very act known as the Sherman Act, and if the language is faulty it is because I have followed the example of those distinguished lawyers and Members of the Senate.

Mr. LOW. Of course, the committee will appreciate that I have never seen this bill before, and am not capable of criticizing it as a lawyer.

Mr. BARTLETT. I hope you will criticize it.

Mr. LOW. But in regard to injunctions, I think that many injunctions have been issued in cases of strikes which went much too far, and that in some way the abuse of the injunction should be restrained. Whether the use of the injunction should be forbidden, is a question for lawyers, and I am not able to answer.

I would like to point out that in the first section of this bill you say:

> That it shall not be unlawful for persons employed, or seeking employment, to enter into any arrangements, agreements, or combinations with the view of lessening the hours of labor, or of increasing their wages, or of bettering their condition.

Do you not want to make it lawful for employers to enter into such arrangements with employees? Under the strict meaning of the definitions that I was discussing earlier, laborers might have the right to make such agreements, but employers might find themselves deprived of that right.

Mr. CARLIN. I think that is a valid criticism.

Mr. LOW. So I think you must make it apply to both sides.

Mr. MCCOY. Mr. Gompers appeared before the committee in support of this bill some time ago, and said that if this bill should become a law it would legalize the secondary boycott, or what a recent book, I believe, now describes as the "tertiary boycott." I do not know how far we are going to get in that enumeration.

Mr. LOW. Mr. Gompers, of course, is vastly better informed on all those questions than I am; but on the question of boycotting we frankly disagree. He thinks it ought to be the right of labor unions to boycott, but it does not seem to me they should have that right unless everybody else has it—I mean, to interfere with commerce by way of restraint of trade. If everybody else has the right to interfere with commerce by way of restraint of trade, then I think labor unions should have the same right; but I do not think they should have it if no one else can have it.

Mr. MCCOY. Of course, a strike is a boycott of the primary kind.

Mr. Low. Well, hardly. A strike is not a boycott. I think the right of striking is recognized everywhere. It is a personal right, and I am personally in sympathy with the phraseology of this act from lines 15 to 21, where it says:

> In construing this act the right to enter into the relation of employer and employee, to change that relation, and to assume and create a new relation of employer and employee, and to perform and carry on business in such relation with any person in any place or do work and labor as an employee shall be held and construed to be a personal and not a property right.

I think is ought to be a personal right; I do not think it is a property right at all.

I would say about section 2 what I have said about section 1. I am in doubt whether that language in regard to horticulture or agriculture would tend to make a favored class of producers or not. I do not believe that the former ought to have rights that other Americans have not; but I do think they are entitled to form cooperative societies and to agree to give to them all their business for the purpose of purchasing more cheaply together and for the purpose of selling what they produce to better advantage. I am not a lawyer, and with all respect to the lawyers who have suggested this language, I think it would be better to change that phraseology so as to permit in terms the formation of such cooperative associations of producers and of consumers, because I think they have and ought to have the right to combine in order to buy more cheaply, to buy at wholesale and distribute economically what they produce. I think you will recognize the propriety of cooperative associations of consumers as well as of producers; because they certainly have the right or ought to have the right to buy together for the purpose of getting things more cheaply, just as producers should have the right to combine together for the purpose of getting better prices for their products. It is very vital, of course, as far as the farmers are concerned and in its effect upon agriculture. You take these gentlemen in Kentucky who raise tobacco; they can not afford to raise tobacco unless they can get an adequate price; and it is the same way with every other producer. You must encourage generous production by enabling the producer to get all that his goods are worth. I come right back to what I said at the beginning, that the trouble with the farmer is that he has to buy at retail and sell at wholesale. That is not reasonable; and cooperative societies are formed to change that, so that under cooperation the small farmer can get his plow as cheaply as the man who has a bigger business. That must be encouraged. When cooperation is thoroughly well developed, a man who produces a small amount of tobacco can get as good a price as the man who raises a great deal of tobacco.

Mr. Nelson. Would not that tend to eliminate the middleman?

Mr. Low. It never has. It is a curious thing that wherever cooperation flourishes the middleman flourishes also. I do not think there should be any discrimination on either side, but would say that you should recognize cooperative associations for the purpose of buying to greater advantage and for the purpose of selling to greater advantage.

Mr. McCoy. And leave the abuse of it to the general phraseology of the bill?

Mr. Low. Yes; that would be my suggestion, and I think in that way you would avoid a sort of criticism which I have seen aimed at this bill—that it is class legislation. It is not class legislation if you word it right. I do not think anybody can say it is class legislation to say that laboring men can have the same right to combine for collective bargaining as stockholders have. That is good sense; it is not class legislation. Neither is it class legislation to say that farmers and consumers can combine for the sake of buying more cheaply or selling to greater advantage. That is not class legislation; everybody ought to have that right. But when you phrase it as this bill does, especially as to agriculture, it looks as though you were giving rights to the farmer that other Americans do not have, and that I am sure this committee does not want to do. As I said before, I think you can leave the abuse to this general phraseology. If those associations when formed become offenders against the Sherman law, then they can be brought to book under the Sherman law.

The CHAIRMAN. If you give them express authority to buy anything, you think this general provision of law will make that right?

Mr. Low. I think it would. I never heard of a cooperative association in any part of the world that entered into the business field in a way to bring it under the condemnation of the Sherman law.

Mr. CAREW. You say it is not class legislation because everybody has the right to do it?

Mr. Low. They have the right to do it now.

Mr. CAREW. Do you say that under the present law they have that right?

Mr. Low. I think so, yes; absolutely. There are cooperative associations of consumers all over the country. There are a great many of them in the neighborhood of New York City. I have known of them to be carried on among dwellers in large apartment houses. Instead of dealing with a dozen different grocerymen and a dozen different milkmen and having a dozen different grocery wagons and a dozen different milk wagons coming up to that apartment house at various hours, they appoint a purchaser for themselves, and all of them will buy from the same place, so there is very often a difference in price in their favor. But under this definition you would make it a breach of the law for them to do that.

Mr. PETERSON. Will not a combination of farmers be rather a local affair?

Mr. Low. I think a combination like that must be mainly, if not altogether, a local thing. They would hardly do anything else.

Mr. PETERSON. It is State-wide in Mr. Thomas's case.

Mr. THOMAS. How is that?

Mr. PETERSON. This combination of farmers, of tobacco growers, in your State is a State affair; it is not a local affair?

Mr. THOMAS. It is under a pooling act of the Kentucky Legislature. They bring their tobacco to a warehouse, it is sold to an agent, and it goes all over the world.

Mr. PETERSON. Has that ever been declared unreasonable?

Mr. THOMAS. It has never been decided in the United States courts. It has been declared all right in the State courts of Kentucky.

Mr. CAREW. That only deals with sections in the State of Kentucky and with particular kinds of tobacco?

Mr. THOMAS. It deals with all sorts of tobacco. We raise all sorts of tobacco—dark tobacco, light tobacco, and also burley tobacco.

Mr. LOW. I am very much obliged to you, Mr. Chairman and gentlemen of the committee, for having heard me this morning.

The CHAIRMAN. We are much obliged to you, Mr. Low, for having appeared before us.

PROF. JOHN BATES CLARK—Continuing.

Mr. MCCOY. Prof. Clark, coming back to what I was asking you about a while ago, are you familiar with the contention of Mr. Reed, of which I have spoken?

Prof. CLARK. I am not familiar with all of it. I have read the parts to which you called my attention. It is a passage that, as I read it off-hand, makes the impression that it would be rather effective; but I do not know that my opinion is worth much as formed in that off-hand way.

Mr. MCCOY. That is about the economical situation, theoretically?

Prof. CLARK. Yes; the proposed bill is evidently intended to secure the economic subject that is essential.

Mr. MCCOY. Have you ever thought at all about the proposition as to whether or not the existence of corporations with these unlimited powers is the thing which has led to monopoly in this country, and without which monopoly could not have existed?

Prof. CLARK. Off-hand, I should say it would be too much to assert that that was the sole and only thing. It is enormous in the facility it gives for creating monopoly, and the disposition of the States to bid over each other for corporate fees, etc., and to offer larger and larger powers, has enormously increased the tendency to consolidate into monopolies companies formerly independent.

Mr. MCGILLICUDDY. Professor, I was a good deal interested in your definition of a trust. Will you turn to page 313 of this list of bills and regulations relating to trusts (H. R. 12121) and read the definition of the restraint of trade given on that page, and tell us if you approve of it. You will notice that definition is that—

> "A restraint of trade" as used in this act, or the antitrust act of eighteen hundred and ninety, shall be deemed to include every restraint of trade as defined by common law, and every restriction of trade or of competition which tends in fact to the creation of a monopoly or to impair the freedom of trade between the States or with foreign nations.

Prof. CLARK. Off hand and merely as an economist, and not as a lawyer, I should say that lines 7 and 8 were exactly in line of the necessities of economic law. When it comes to the various possible constructions that may be put upon the "restraint of trade," I prefer to retire from the field.

Mr. NELSON. On that very point, I would like to ask you this question: The Sherman law prohibits every restraint of trade. The Supreme Court has read into that the words undue or unreasonable. When a judge interprets the law in order to discover whether some alleged violation is undue or unreasonable, what will he have to draw upon, his legal knowledge or his economic views?

Prof. CLARK. I should say that, with a background of legal knowledge which would be a very essential thing, he would here use his economic knowledge.

Mr. NELSON. One judge might have certain views about certain acts economically, and another judge would have, perhaps, wholly different conceptions of the economic situation; might that not be true?

Prof. CLARK. That, of course, is true and a person's a priori deductions will color somewhat his opinions drawn from facts. Nevertheless, it is a question of fact he would have to decide.

Mr. NELSON (interposing). If every restraint is prohibited, the line is fixed and it is not a matter of discretion as to the economic situation?

Prof. CLARK. I was about to suggest one thing which perhaps has an application there. If we look at the problem simply from the side of the combination and say that one combination shall be adjudged reasonable, because it does reasonable things, while another combination is unreasonable it does not need, in theory, to be arbitrary at all.

There is many a line which it is perfectly possible to draw clearly in theory, but it will take a good deal of skill and judgment to draw such lines in practice. That I conceive to be the situation here. I do not think there is any haziness whatever in the scientific delimitation of the reasonable conduct, but I do see that conditions shade each other by such imperceptible degrees that any court would be liable to more or less of error in applying the principles. I do not see how it is possible absolutely to avoid this, and yet I do not think it will be possible to have a tolerable condition unless the law brings the action of corporations into line with what is described as the rule of reason.

I suppose it is pretty well established that such specific acts are illegal when they help to create monopolies. What does this mean? Does it mean creating a nation-wide monopoly, or does it mean creating a monopoly somewhere, say in any place where competition formerly existed? If the prohibition of monopoly applies locally as well as nationally, that fact of itself is almost sufficient for our purposes, and the thing that does not create monopoly anywhere is reasonable, and a thing which does create monopoly anywhere is unreasonable.

Mr. MORGAN. What do you mean by a monopoly? For instance, take the United States Steel Corporation. Do you regard that as a monopoly? What do you mean by a monopoly?

Prof. CLARK. Personally I do not at present regard the United States Steel Corporation as a complete monopoly in the full sense of the law or in the full sense in which I could use the term in economics, because it is possible for a purchaser to get steel from an alternative source.

If, however, I am mistaken in thinking that is really an independent source, and if some occult arrangement exists whereby the appearance of independence in the case of producers outside of the trust does not amount to anything, it is a monopoly.

Mr. MCCOY. In discussing this matter have you left out of consideration the fact that in the first section of the Sherman law it applies to restraints of trade, or do you consider the restraint section and the monopoly section as being practically one and the same thing?

Prof. CLARK. That really raises a question in the history of law. I greatly doubt whether, if we were beginning now, de novo, to make laws the phrase "restraint of trade" would ever be used. No economist would ever want it to describe what he objects to. You can express what the economists want much more certainly.

Mr. McCOY. Is not the restraint-of-trade phrase a valuable thing to have, because it refers to one of those things which may not have created a monopoly but which has a tendency to create a monopoly? So, as though you might be given a different phrase, the word in itself shows whether it has reached the monopolistic stage, and it is something that ought to be forbidden.

Prof. CLARK. As used in the law, I do not see how we can avoid taking account of its historic significance, and I think we are forced still to use it. If it describes what has a tendency to create a monopoly, it is entirely available.

Mr. McCOY. Then the United States Steel Corporation might be under the ban, whether or not it has reached the monopolistic stage?

Prof. CLARK. If it were on the way to the monopolistic stage, with a strong probability of reaching it, it would.

Mr. McCOY. What difference does it make, so long as you can see that human beings are constituted so that whatever they have the power to do for their own benefit they are likely to do? You do not need to go into the realm of probability any further than that.

Prof. CLARK. No; I should not.

Mr. McCOY. If a restraint of trade has a tendency to lead to monopoly, and if it exists, it ought to be made unlawful?

Prof. CLARK. I shall very likely display my ignorance of the history of the law, although I have so fully acknowledged that already that it will not do much harm if I go outside of my province and give an opinion where a jurist's opinion is worth much more.

The restraint of trade which, as I think, is probably at the bottom of the old and almost prehistoric statutes against partnerships was a belief that they restrained competition between the persons who went into the combinations. Now, if competition outside of that limit is reduced materially, so that the public is injured, that is a thing requiring prohibition by law. If general competition in the production of an article is not reduced materially, and the public is not injured, I should not say that the stopping of the competition between the partners did require prohibition by law.

Mr. McCOY. Then you get somewhat into the position that Mr. Nelson talks about, do you not, and a whole lot of things would occur that——

Prof. CLARK (interposing). Well, we are back——

Mr. McCOY (continuing). Which has to be determined on an economic basis, rather than a legal basis.

Prof. CLARK. Certainly you have got to depend on your knowledge of the economic situation.

Mr. CAREW. Would not that be a matter capable of proof; would not that be a matter of fact?

Mr. McCOY. That is another point that I was coming to, in regard to these definitions.

Mr. CAREW. As I understand it, the Government is compelled to prove it is an economic injury?

McCoy. The Government's contention in the Standard Oil
)ther cases, has always been that every restraint of trade, re-
.ess of whether or not it was economically injurious to indulge
or not, was forbidden.
rsonally, that is my own view of the act. I do not think that
Supreme Court of the United States has said anything whatever,
r as any decision that is binding on anybody is concerned.
. Nelson. I would like to have one other point cleared up, if
', Professor.
f. Clark. I shall be very glad to give whatever information
on it.
Nelson. You spoke of reaching monopolies in the forming
than after they were completed.
of. Clark. Yes, sir.
Nelson. Did you mean, by saying that, that you would also
the dissolution of those already formed?

Prof Clark. I assume that the law will continue to work to that end as at present.

Mr. Nelson. You did not mean to say that we should attempt to prevent those that were forming and allow those that are formed to remain?

Prof. Clark. No; that would be a large camel to swallow, after straining at a gnat.

I have in mind to add only one think, and that is, that, in applying the rule of reason, we are not without the possibility of testing the effect of a combination locally, as well as generally.

It will not be at all impossible to find whether, in that hypothetical case in which I supposed a certain manufacturer operating in three States was unable to operate after a trust invaded that field, that the monopoly building was going on within that area, although we might have had a great many other States in which the extinction of competition were not going on. In that case we could not have broken that combination merely on account of that one act, as creating a national monopoly. Yet it ought to be condemned. It established a monopoly in one field and a like procedure would extend it to other fields.

Mr. McCoy. The Supreme Court has made use of exactly that kind of a thing in two great decisions, and as I recollect those decisions they did go particularly into what had actually happened, but they laid more stress upon the contention that having got that far there was a tendency to a monopoly, and therefore they restrained those corporations largely regardless of what had actually happened and because of the power which they had in view of the various contracts and agreements they had made.

Prof. Clark. Yes, sir. We may say monopoly is that monopoly does in any case; and, to go further, monopoly is that monopoly is able and naturally impelled to do.

Mr. McCoy. In other words, they paid more attention to the first section of the Sherman law than to the second section, and they said the conditions mentioned in the second section might be brought about because of the power they have had.

Prof. Clark. My judgment is that, from the economic side, we should recognize the situation created by the law as now construed

as relatively safe but not absolutely so, although indefinitely better than it was for a long time after the trusts were formed.

Mr. VOLSTEAD. Would not this have a tendency to force combinations now existing to incorporate as one corporation rather than continue to exist as separate corporations?

Prof. CLARK. May I ask which particular section you refer to?

Mr. VOLSTEAD. Take the first bill, which prohibits acts done by combinations and specifies various things that they must not do as a combination. Would not the tendency of this class of legislation be to consolidate into one corporation these various combinations that now exist?

Prof. CLARK. In so far as that is possible under the law; in so far as the consolidated corporations would escape the law and the unconsolidated ones would fall under it, that is the effect. The law did that to a tremendous extent in the early history of trusts in America.

Mr. VOLSTEAD. I would like to ask your views in regard to prohibiting one corporation from owning the stock of another corporation as a means of building up large aggregations of capital.

Prof. CLARK. I should say that was a thing which had so much inherent danger that it had better be prohibited.

Mr. VOLSTEAD. My impression is that the English common law prohibited that use of corporate funds.

Prof. CLARK. I have never personally believed that additional facilities for doing business were worth as much to the country as would suffice to atone for the danger which impended at the beginning of the formation of the trusts and would materialize in real monopoly but for an improvement in the law. I think combination would have been certain to run into abuses that would have harmed the country more than it has been harmed or with good legislation is likely to be harmed.

Mr. VOLSTEAD. This act may have the effect of creating larger aggregations of capital as one corporation.

Prof. CLARK. That might be conceivable.

Mr. VOLSTEAD. And in that way make more perfect the monopoly now existing in many lines?

Prof. CLARK. Any views of mine in that connection presuppose that we can and shall deal with any immensely large monopolies of the country in some way.

I would like to add that the sole objection which I have urged against any part of the series of tentative bills under consideration applies to a phrase in bill No. 2. Four general purposes of combination are specified as bringing a combination under the condemnation of the proposed law. The fourth of these would seem to prohibit any combination or partnership between independent producers, even though competition were not less effective after they had combined than it was before. Competition has been rendered comparatively ineffective in some part of the market for the goods produced; a natural economic law fixes the prices of them and protects the public from extortion. After A has ceased to compete with B, and C has ceased to compete with D, A and B in partnership may compete so vigorously with C and D in partnership as to afford an undiminished guaranty of fair prices. An economist must distinguish between the combination which reduces the total amount

and efficiency of competition and that which does not, and the law will need to take account of that same distinction.

The CHAIRMAN. We are very much obliged to you, Prof. Clark, for having appeared before us and given your views so extensively on this subject.

Prof. CLARK. I am very glad to have been able to appear before you, Mr. Chairman, and I appreciate the courtesy of the committee very much.

(Thereupon, at 12.20 o'clock p. m., the committee took a recess until 2 o'clock p. m.)

TRUST LEGISLATION

GENERAL LIB.
FEB26 1914

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 9

STATEMENTS OF

FRANK W. WHITCHER
A. G. THOMAS
CHARLES KIRKE
J. W. JONES

FEBRUARY 10, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Statements of:	Page
Frank W. Whitcher, of Boston, Mass	335
A. G. Thomas, of Sandy Spring, Md	350
Charles Kirke, of Sandy Spring, Md	350
J. W. Jones, of Sandy Spring, Md	350

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
ROBERT Y. THOMAS, Jr., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	LEONIDAS C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 9.

COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Tuesday, February 10, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Will you please give your name and address to the reporter.

STATEMENT OF MR. FRANK W. WHITCHER, OF BOSTON, MASS.

Mr. WHITCHER. My name is Frank W. Whitcher; my address is 14 Albany Street, Boston, Mass. I am representing the National Leather and Shoe Finders Association, whose headquarters are at St. Louis. I am the treasurer of that organization.

I am here, gentlemen, to ask you to consider, and to consider strongly, the question of the establishment and maintenance of the resale price upon branded and trade-mark goods.

This organization which I represent is composed of small dealers in leather for the shoe-repairing trade and the small tools which go to that class of trade, and also dealers in findings and supplies which are sold to the retail shoe stores. These dealers who make up this organization have stores in most of the cities of the country. They

are men of moderate caliber, with a capitalization ranging anywhere from a thousand to $50,000 or $75,000, although the average, I should say, is not over $25,000 or $30,000.

They are small people, as the world would term it, and this organization was formed because of the necessity these men found for protecting themselves in the matter of credit, so much of the repairing trade being a poor class of trade, the class to which they had to sell. They get together once a year to compare notes as they gather in their annual convention, and to study the question of freight and other questions of that kind. A good deal of the stuff they handle is like nails, and such things, which are rather heavy, and on account of which the item of freight is quite an item, and matters in relation to the kind of stores, etc.

This organization has no connection with the United Shoe Machinery Co. whatever, and in fact, would be considered competitors of that concern.

Now, the reason I bring this question to you is because it is a question of service. It is a question of service to the public which everybody in business renders. This service can not be rendered in a satisfactory way to the public if deteriorated goods are going to be delivered. In our line of business there are a great many items which have been developed, and, considering the quality of the article, a price has been made which renders, I presume, to the manufacturer a fair margin, and to the jobber, but it rarely renders a margin of over 20 per cent. That is a little closer than any dealer in our line of business can afford to handle goods, but competition has forced it down to that point.

In other words, it costs our people to-day on an average of 15 per cent to do business, and if they get 20 per cent they have to be satisfied. In fact, some goods are sold at a very much less margin than that.

The reason I am speaking of the establishment and maintenance of prices on branded and trade-marked goods is this: A reliable article, we will say, is offered to the public; it is used by the public, and it renders the service for which it is intended. It makes good. Pretty soon some competitor of ours may make another article similar to that and call it just as good. They come out with that other article and they sell it for a less price.

Then another competitor takes the article, which is a standard article and on which a reputation has been obtained, and he cuts the price. If he is only making 5 per cent he will sometimes get out if he is allowing a margin of 20 per cent, but sometimes he will cut it to 10. That forces his competitor to do the same thing; then there is a seesawing, and finally it will get down as low as I will cite to you in the case of the Sullivan rubber heels.

The price which most of the people over the country charge for those goods ranges from $3 to $3.25 a dozen on the men's, and on the women's from $2.75 to $3. They cost $2.70, and if they are sold for $2.75 there is a margin of only about 2 per cent. Other makes of heels are sold in the same way.

You ask why the public is injured by that. The dealers are saying that that is all they can give, and this article is put at a lower price, and it is sold at a lower price to the retailer, and the manufacturer of the original goods finds he is losing trade, and the result

is that he studies in order to see if there is not some way whereby he can reduce his price.

Mr. CARLIN. Mr. Whitcher, have you read bill No. 1?

Mr. WHITCHER. I have not had time to go over it. I only arrived in Washington this morning, and I did not know that I was to come before your committee so soon, and I have not had a chance to go over the bills.

Mr. CARLIN. You will find in section 9 of that bill a provision which, while it is not a price-fixing provision by any means, requires the fixing of the same price——

Mr. WHITCHER (interposing). I understand that is where the large dealers try to kill off the small dealer.

Mr. CARLIN. That is one of the things. What I am trying to call your attention to is the fact that this committee has not undertaken to take up such an idea as a price-fixing scheme, because we have not believed the Government ought yet to take hold of individual business.

Mr. WHITCHER. No; but I thought your committee were considering, among other things, the question of the permission for the establishment of resale prices and the maintenance of them on branded and trade-marked goods.

Mr. CARLIN. Only so far as bill No. 1 relates to that subject, and we have not undertaken to give authority for fixing prices. Your position, as I understand you, is that you want a price-fixing scheme all the way down to the consumer.

Mr. WHITCHER. Our position is that without it there is a lower standard of goods.

Mr. CARLIN. You approve of the Brandeis idea, in other words?

Mr. WHITCHER. I most thoroughly do in that particular respect.

Mr. FLOYD. Has not that practice been condemned under a decision in connection with the Sherman law?

Mr. WHITCHER. I think it has, and that is one of the reasons I am here, because the manufacturers of branded goods have established prices which were only fair to the trade, and the cutting of those prices to-day is rendering trade unprofitable and the credits of the people poorer. And with poorer credit and less money to work on, and less margin of profit, the public is not properly served, and, further, with the cut prices on these goods, the standard of quality has deteriorated and the public at large does not receive the service they are entitled to.

Mr. FLOYD. We are making laws, and laws should be general. The man who handles patented goods has a special privilege against every other dealer in the nature of a monopoly. He already has that privilege.

Mr. WHITCHER. Does he have the right to establish a resale price?

Mr. FLOYD. No, sir; but he has a monopoly in law to manufacture that particular commodity.

Mr. WHITCHER. Yes, sir.

Mr. FLOYD. And you want to give him, do you not, an additional privilege over every other man who handles the goods, or would you favor a law that would allow the man who manufactured patented articles, who produced agricultural commodities, for instance, to fix the price to the consumer in each instance?

Mr. WHITCHER. I would, if he has a brand or trade-mark of his own.

Mr. FLOYD. Why give those men who are already given a special privilege over the man who has not those privileges in law, why give him additional privileges? Those men have already certain exclusive privileges by reason of patents and trade-marks, and yet you want to give them an additional privilege.

Let me ask you this question: What right has any man, after he sells an article to another man and receives the money for it, to control the price of that article in the hands of the man who bought it?

Mr. WHITCHER. What right has a man to sell a piece of real estate with restrictions on it?

Mr. FLOYD. I am not talking about real estate; that is a different position. If a man sold a piece of real estate in fee simple, he has not any restrictions on it. You propose to sell this trade-marked article, and after its ownership has passed to another individual you want the man who has sold it to be given the right under the law to control the price of the commodity in the hands of the retail dealer—to control the price at which the retail dealer shall sell that article to the consumer?

Mr. WHITCHER. The reason of that, which is a fair one, it seems to me, is this: When the manufacturer of the article is injured by the cutthroat competition, it is caused by allowing everybody to sell at whatever price they please.

Mr. FLOYD. I will not argue with you for a moment the question as to whether or not it will be an advantage to the manufacturer of the patented article. But it seems to me you have overlooked a great majority of the people in this country who are consumers, who have to buy those articles.

Mr. WHITCHER. No, ser; the consumer is the very party I was looking out for, in order to protect him, so that he can get the article in the original form in which it is manufactured and not in a deteriorated form, because the manufacturer is forced to lower his prices.

Mr. FLOYD. If you are going to do that might not that evil be prohibited by other laws preventing him from doing that?

Mr. WHITCHER. That would be coming back to the manufacturer. I do not know about that.

Mr. FLOYD. If we are going to have any freedom of contract left in this country at all, or any individual liberty, how can we have it under the system you propose of allowing the manufacturer at the top to fix the price to the jobber, and then letting it run along down from the jobber to the retailer and compel the customer to buy at the arbitrary price fixed by the manufacturer?

Mr. WHITCHER. The arbitrary price fixed in my business by the recent decision of the Supreme Court of the United States was so close that it rendered no more than a fair margin to our dealers, and you get competition, no matter whether the price is fixed or not.

I think the establishment of a price on a good article makes the other manufacturers want to supercede in quality the article which has previously had the call of the trade. In other words, it lifts the trade up to that standard of quality, whereas the cutthroat competition drives the standard of quality down to the price.

If a standard article sell at, say, $3 a dozen, and the dealer makes only 25 cents on it, and it costs him 15 or 20 cents to do his business, I think you will agree that that is a fair margin of profit on those goods. If the price was fixed where he was getting 5 cents, the manufacturer could not hold his position nor could the jobber prevent the retailer from selling at the lower price, because the greater the inducement the stronger is the sentiment to get the trade away from the other man. If the article is sold at $2.75 would you attempt to do business on the basis of a 5 cent or a 2 per cent margin? No. You do not think I am going to take something I can sell and make only 10 or 12 cents a dozen on it, and that is the least I can afford to do business on. I will throw out those goods. Then the manufacturer of standard goods has lost his business.

Mr. CARLIN. Do you think the Government of the United States is under any obligation to make laws which will enable individuals to make a profit where they can not make it in fair competition with other dealers?

Mr. WHITCHER. I think myself, sir, that the time is coming when the Government has got to make a law which will permit the establishment and maintenance of resale prices on branded and trade-marked goods for the protection of the individual purchaser and to keep up the standard of quality, otherwise the standard will be reduced.

Mr. CAREW. Who will reduce it?

Mr. WHITCHER. The dealer reduces it.

Mr. CAREW. You gentlemen make it?

Mr. WHITCHER. It forces the price down to so close a margin that it is thrown out by the trade and poorer substitutes are used.

That is being done. Rubber heels are being sold to the repairers at 12½ cents a pair, and the nominal price to the public is 50 cents. The dealer supplies the 12½-cent heel for 50 cents, and the public is injured.

Mr. FLOYD. I have used both kinds, and the cheaper one wears on the shoe easier.

Mr. WHITCHER. Then you have an exceptional one.

Mr. FLOYD. As I understand, the custom of a great many concerns is to do the very thing you claim they ought to have the right to do, and which was done previous to the recent decision of the Supreme Court of the United States, and they have been doing it for a number of years.

Mr. WHITCHER. I think it has been the custom.

Mr. FLOYD. I want to ask you this question, if you approve of this kind of proceeding? A jeweler in my district was talking to me on the subject, and he told me his manufacturers not only fix the price to the jobber, but they fixed the price at which he was allowed to sell to the customer. They required him to buy his watches and pay cash for them, and yet if he sold below the price they fixed the result was a complete boycott, and he could not buy another watch in the United States.

Mr. WHITCHER. No, sir; I did not mean to sanction a thing like that.

Mr. FLOYD. This man showed me a card containing his price list, and at the bottom of that card it said:

We will pay a reward of $10 to any person who will furnish us reliable information of any of our customers who have been guilty of cutting prices.

Mr. WHITCHER. You are coming back to the manufacturers there.

Mr. FLOYD. He said, "I am here in a small town and I have a stock of jewelry that will be suitable to the people in this town." And he said, "If I desire to sell out and go to another town where I would have to have a more expensive and different class of jewelry, and if I desire to sell these goods—they are mine—and if I desire to sell them to my neighbors and friends who have been trading with me for years a little below the price fixed, I could not buy another watch in the United States if I did that."

Do you want to establish and maintain such a system as that in the United States?

Mr. WHITCHER. No, sir; I should oppose that as strongly as possible.

Mr. FLOYD. Will not that be done, and has not that been done, when you did exercise the power to control the price?

Mr. WHITCHER. No, indeed.

Mr. CARLIN. What penalties do you fix for violation? Suppose we gave you the right to fix the price to the consumer, and that was violated, what penalty would you fix for that violation?

Mr. WHITCHER. I do not know.

Mr. CARLIN. Suppose they sell at a lower price, what would you do to them, what do you think we ought to have as a penalty for that?

Mr. WHITCHER. I think the manufacturer would have a cause for redress against the dealer in a case like that. I would cite particularly the situation in a case of which I have a copy, which came up in Washington, which was the case of a flour-mill company against a dealer. That company sold to the dealer at a special price in carload lots, and they had a resale price at which that flour was to be sold to the consumer, and that dealer cut the price and they brought suit for damages and the supreme court of Washington gave them the decision. The decision was in their favor.

But I do not believe that it would be possible, from my own experience in merchandising, to establish any but a fair price on branded and trade-marked goods.

Mr. CARLIN. What penalties would you fix? If we were drawing a statute to protect those contracts to be made, we would have to fix either a civil or a criminal penalty for the violation of that statute. What is your idea as to the penalty?

Mr. WHITCHER. I think that would be according to the injury which had been done to the manufacturer.

Mr. CARLIN. You would make a civil penalty?

Mr. WHITCHER. I think I would.

Mr. CAREW. According to whose injury?

Mr. WHITCHER. The manufacturer's.

The price of the goods is lowered, the people get the impression that the qualityof the goods is lowered.

Mr. DYER. The manufacturer would not own these goods that were sold, and as Judge Floyd has stated, the actual and vital abuses come from the manufacturer. You can not maintain a civil action for damages in such a case.

Mr. WHITCHER. I think the law which causes—that when the title passes to the dealer, limiting the rights of manufacturer, that that is all wrong. I think the manufacturer should have the same right

to dispose of his goods, something to protect the reputation he has maintained, subject to a restriction which will help him hold that reputation. He would have the same right as a man owning real estate, who might want to establish certain restrictions in regard to his neighbors.

Mr. DYER. You disagree with the Supreme Court of the United States in those decisions which they recently rendered on this point?

Mr. WHITCHER. I believe that for better public service, for the good of the people at large, the quality of goods sent out by the manufacturer should be maintained, the quality which the advertising and the reputation of the goods have obtained, should be delivered to the user continually.

Mr. VOLSTEAD. Is it not true that if that were done nearly everybody producing an article could fix the ultimate price to the consumer, because you can get a trade-mark on almost any sort of an article?

Mr. WHITCHER. I appreciate that, too. It seems to me it is a question of fair or unfair business methods or morals. I think you will all agree with me that it is unfair for a chain of department stores to advertise a special line of goods, goods which have a standard reputation, at a price less than actual cost price. That is a direct injury to the manufacturer, because it gives the impression to the public that the standard of those goods has been lowered.

Mr. DYER. You want a law that will prevent unfair competition; is that not what you want?

Mr. WHITCHER. That is all I want. In our own business the lines of business do not change.

Mr. CARLIN. You think a price-fixing law is the law that will do that; that is your remedy?

Mr. WHITCHER. On branded and trade-marked goods.

Mr. MITCHELL. Did I understand you to say that you competed with the United Shoe Machinery Co.?

Mr. WHITCHER. They have gone into the manufacture of findings, somewhat.

Mr. MITCHELL. Do you produce any machinery? Are you putting any shoe machinery on the market at all?

Mr. WHITCHER. Nothing but some little tools.

Mr. MITCHELL. Do you manufacture tools?

Mr. WHITCHER. Some small tools. The United Shoe Machinery Co. manufacture largely power machinery. They make the goods that go with the machinery, but the finders buy goods and handle goods which are made by independent people.

Mr. MITCHELL. Is the United Shoe Machinery Co. your chief competitor?

Mr. WHITCHER. No. There are a lot of people who make these different things. The United Shoe Machinery Co. are not people who are aggressive in the findings business. They do not slaughter prices, do not cut prices as the chain department stores do.

Mr. MITCHELL. Do you regard the United Shoe Machinery Co. as a monopoly?

Mr. WHITCHER. Not in the finding trade.

Mr. MITCHELL. In the machinery trade, the shoe machinery trade?

Mr. WHITCHER. I can not say much about the United Shoe Machinery Co., because I am not in close touch with them.

Mr. DYER. What is your company?

Mr. WHITCHER. Our association is the National Leather & Shoe Finders' Association.

Mr. DYER. A Missouri corporation?

Mr. WHITCHER. It is not a corporation.

Mr. DYER. It is located in the city of St. Louis?

Mr. WHITCHER. Oh, no. The members are in almost every State of the Union.

Mr. DYER. I understood you to say in your opening statement it was a St. Louis concern.

Mr. WHITCHER. The headquarters are in St. Louis.

Mr. DYER. Who is the head of the organization?

Mr. WHITCHER. Mr. Henry Cline, of Chicago, is president; Mr. P. W. Hubert, of St. Louis, is chairman of the executive committee; and Mr. George A. Knapp is the secretary; and I am the treasurer of the association.

Mr. DYER. What shoe companies are they connected with?

Mr. WHITCHER. Mr. Knapp is simply the secretary of the organization, and he has nothing else to do but attend to the work connected with that office. Mr. Hubert's business is as manager of the findings department of the James Clark Leather Co., of St. Louis. Mr. Henry Cline is at the head of the firm of Henry Cline & Co., of Chicago.

Mr. DYER. Your organization is not a corporation?

Mr. WHITCHER. No; it is just an association of dealers who get together once a year to have a social time and to discuss trade conditions and consider credits and anything whereby they can improve the general conditions in the trade.

Mr. DYER. It is not controlled by the shoe manufacturers?

Mr. WHITCHER. Oh, no; it has nothing to do with them; we do not buy anything of them. We come closer to the individual people than any other trade connected with that general business, excepting the shoe stores.

Mr. DYER. How many stores in the city of St. Louis do you think are members of your association?

Mr. WHITCHER. I should say six or eight.

Mr. DYER. What are the names of some of them?

Mr. WHITCHER. There is the James Clark Leather Co., the Standard Leather Co.—I can not tell you all of them offhand.

Mr. DYER. No retail merchants belong to it?

Mr. WHITCHER. No. They supply the goods to the repairers and the retail shoe stores.

Mr. DYER. Do you maintain a repair shop in St. Louis?

Mr. WHITCHER. No; they supply the repair shops.

Mr. CARLIN. Have you been in the habit of making exclusive sales contracts with your customers?

Mr. WHITCHER. No. We, as dealers, have not. What we want is a chance to prevent the man of irresponsible finances, the man who wants to come in and put in a little stock of goods, say, amounting to a thousand or two thousand dollars worth, and to hang around and then sell them at a cutthroat price, and then clear out. It is that sort of irresponsible dealers who do the most harm.

Mr. CARLIN. You want to choke off the little fellow?

Mr. WHITCHER. No, sir; not a bit. We want the little fellow to make the money. We are the little fellow. We do not make any money on goods which are sold on a margin of 5 cents a dozen profit, and the quality of the goods is likely to be deteriorated on so close a margin.

Mr. CARLIN. Your association is not chartered?

Mr. WHITCHER. No, sir; it is just an association of men for the purpose of getting together and discussing matters in connection with the improvement of trade conditions.

Mr. CARLIN. What is the object of it?

Mr. WHITCHER. One of the chief objects is to keep records of credits, because the repairing trade is a trade which is very shifty. If a man in one city clears out and does not pay his bills, and then clears out with the goods, a record of that transaction would go to the secretary of the association.

Mr. CARLIN. You keep a black list?

Mr. WHITCHER. No; we do not keep a black list, as it were. If you were doing business, you would want to know whether you could sell a bill of goods to a man and be reasonably sure of getting your money. Then you would want to know something about his character, whether he is a thrifty man and a good workman.

Mr. CARLIN. But if he has not paid heretofore, you put him on your unreliable list?

Mr. WHITCHER. Yes; I presume we would have a memorandum of that. You can not call it a black list any more than you could call Dun's Agency a black list, because that gives you information which every merchant has to know for his own protection.

Mr. MITCHELL. I understood you to say that the United Shoe Machinery Co. is a competitor of yours?

Mr. WHITCHER. Yes; they are in the little goods they make.

Mr. MITCHELL. Do you know who supplies the machinery to these repair shops, most of it?

Mr. WHITCHER. Yes; there is the Universal Machinery Co., of St. Louis, and there is the Champion Machinery Co., of St. Louis.

Mr. MITCHELL. Is not most of it supplied by the United Shoe Machinery Co.?

Mr. WHITCHER. No.

Mr. MITCHELL. It is not?

Mr. WHITCHER. No; not to the repair trade. They have what they call the United Shoe Machinery Repair Co., in which they put the goods out on lease. All the other people sell their goods. The lease price is prohibitive to most of the small men. They do not do business enough to warrant them in paying their price.

Mr. MITCHELL. In the findings trade are they your chief competitor, the United Shoe Machinery Co.?

Mr. WHITCHER. No.

Mr. MITCHELL. Is it some of the smaller dealers?

Mr. WHITCHER. The chief competitors are dealers, not the manufacturers. The dealers themselves need something to let them get a fair price on that kind of business.

Mr. CARLIN. How have you done that up to this time?

Mr. WHITCHER. Up to the time of the decision of the Supreme Court of the United States the dealer would say, "Here, we can not

make any money on your goods unless you will make a price which can be maintained and and which will give us a fair margin of profit." Then he will say, "What is a fair margin of profit?'. Then the other man will say, "Twenty per cent on your goods is the least we can afford to handle them for."

Mr. CARLIN. Do not the dealers agree among themselves first as to what should be a fair margin?

Mr. WHITCHER. I do not think so. I think if a man was coming to sell me goods, and I had been handling his goods at 5 per cent I would say to him, "No; I am going to push the other man's goods."

Mr. CARLIN. You are talking with reference to the manufacturers. Was there an understanding or agreement between the dealers as to the margin of profit for which they would distribute these goods?

Mr. WHITCHER. No. There is no understanding among the dealers as to these prices.

If I were talking with a man from San Francisco or Los Angeles I would say, "How much do you have to add to your goods for freight, and how much can you get in your section?" And he might tell me. I might say, "We can not get anything like that in our section because we are so close to the markets and the goods can be delivered in a couple of days, where in your case, out on the Pacific coast, it takes three or four weeks."

Mr. CARLIN. When you make your contracts with the repair-shop man, do you compel him to agree that he will sell the goods at a certain price before you will supply him?

Mr. WHITCHER. We do not make any contract like that. We supply the shoe store. The people who manufacture the goods advertise them at so much, as in the case of the O'Sullivan heels.

Mr. CARLIN. What I am driving at is how have you protected yourselves before unless you did require something like that of the repair man? Unless you did something like that, it looks as if you would be in the same position now as before.

Mr. DYER. Did you make an agreement with them by which the repair man would sell at a certain price?

Mr. WHITCHER. No; we did not. The repair man will buy the goods from one dealer or another at so close a margin that there is no profit to the dealer. You must understand that there is a manufacturer, there is a jobber, there is a retailer who supplies the repair man.

Mr. CARLIN. I am trying to find out how you penalize the repair man who sold your goods at less than you thought he ought to sell them.

Mr. WHITCHER. We are not trying to penalize the repair man; but he delivers a cheaper article and gets the full price for it.

Mr. CARLIN. How did you prevent that before the recent decisions of the Supreme Court of the United States?

Mr. WHITCHER. The reason that the repair man sold—the repairer used to put in the best goods, and the cutting in price——

Mr. CARLIN (interposing). You are not answering my question.

Mr. WHITCHER. If you will allow me to go on and answer you in my own way I will get to it.

The cutting of the price would lower the standard of the other goods, giving the repairer an opportunity to buy the deteriorated goods, and that allowed him to make more profit, and yet the public did not get the best quality of goods.

Mr. CARLIN. How, then, did you prevent that before these recent decisions of the Supreme Court?

Mr. WHITCHER. We did not attempt to prevent it.

Mr. CARLIN. Well, then, the conditions will continue just as they have been heretofore?

Mr. WHITCHER. I do not think so. I think the people will take the goods branded and trade-marked; and if the trade likes them, and if the public use them and like them, and the dealer makes a reasonable profit on them, he is going to continue to sell those goods, and he will sell them to the repair man, and they will go through to the public. If the dealer does not make that profit on the standard goods, he will push the lower class goods.

Mr. CARLIN. What is the difference between your condition now and your condition prior to the recent decisions of the Supreme Court of the United States? How have those decisions changed the operation of your business?

Mr. WHITCHER. Just this way: That the public do not get the best goods—the goods which they used to get. That is where the public is injured.

Mr. CARLIN. Did they get them before the decisions of the Supreme Court?

Mr. WHITCHER. Yes; because the dealers made the profits on the good goods and pushed them. Now, on account of the cutting of the prices on the good goods, they push the cheaper grades of goods.

Mr. CARLIN. How did the dealers prevent the cutting of prices before the recent decisions of the Supreme Court?

Mr. WHITCHER. A manufacturer would say to us, "If you do not maintain my resale price on these goods, I will not supply you with them," or "If you cut the price, it is an injury to my reputation, and I ought to have redress."

Mr. CARLIN. What was his redress before? Did he not refuse to sell you any more goods?

Mr. WHITCHER. When he was permitted to establish prices he refused to sell us the goods. Now he can not do that. Am I not right?

Mr. CARLIN. I think you are to this extent, I think he can fix the price to the first purchaser, but beyond that he loses control whether he is a patentee or otherwise.

If you will read bill No. 1 I think you will have a better idea of what we are attempting to do, and it may be that you will find we have already provided for some relief.

Mr. WHITCHER. I should say you have provided for relieving monopolies, but there are quantities of people who have developed a reputation on some special article, which is only the monopoly which the trade gives them.

Mr. CARLIN. Take a patented article, that is a monopoly?

Mr. WHITCHER. Yes.

Mr. CARLIN. The patentee has that monopoly now, so far as his sales to first hands go, but he has not, beyond that. The only difference between you and the Supreme Court is that you want them to go on as they have been doing, and not only monopolize the market but monopolize by agreement as to prices.

Mr. WHITCHER. You know there is competition between manufacturers of patented goods. Then the competition changes and

somebody else comes in, and there are, perhaps, half a dozen patented articles of the same kind, and the standard is lowered. I do not believe that you can controvert my statement that the public is not served unless the dealer can get a fair margin of profit for doing his business. He will attempt to put in goods—he is in business to make money. He will put in cheaper and deteriorated articles every time when he can make them go. If he can make a better or bigger profit on the cheaper goods he does not care.

Mr. CARLIN. If we are to do what you are asking would not this be the final result? In other words, if we were to give the proposed trade commission the right to fix the price at which you shall sell your goods would not the demand from the public force you to sell at a lower price rather than at a higher price, which is what you want to do?

Mr. WHITCHER. No.

Mr. CARLIN. Have you stopped to reflect what effect a demand by the public would have on a commission of that sort, for prices lower than, in your judgment, would make a fair and reasonable profit to you?

Mr. WHITCHER. They would unquestionably be taken care of by the manufacturers of cheaper goods. If people want cheaper goods they will be delivered to them, but it would not necessarily force a manufacturer of goods to put his prices down.

Mr. CARLIN. If the commission had power to fix the price of what you are selling, the quality would have to be considered, and they would fix the price on the low quality lower than the price on the article of high quality?

Mr. WHITCHER. Certainly.

Mr. CARLIN. When public sentiment came in and declared that your prices were not low enough, do you not think you are shooting at the wrong target, that the commission would be more inclined toward the consumer than toward the dealer?

Mr. WHITCHER. On articles of large consumption that might be so, but on our articles the business is not large enough to create a public sentiment.

Still I do believe that—for instance, in the automobile trade I understand they used to establish their prices in that way, but, of course, that is quite a large industry. The time will have to come, if the dealers are going to make a fair living out of their business, when something to prevent cutthroat competition will have to be established in order that the public may be properly served.

Mr. CARLIN. That may be true, but what I am trying to point out to you is that when you put such a power in the hands of a commission, which is responsible to public sentiment, you may find yourselves worse off than you are now, when you are able to handle your own business to suit yourself.

Mr. WHITCHER. I do not think so.

Mr. CARLIN. In other words, you think that business would be better off if managed by the Government than if managed by yourselves?

Mr. WHITCHER. No. I think if we had the right to register our prices that we would get for the goods, and the Government would look into those prices, and if they wanted to change——

The CHAIRMAN (interposing). If you once concede that power to the Government, suppose the Government would say, "Twenty per cent is too much margin, we will cut that profit down to 15," then the business goes along in that way, and after a while the public demands that there be another reduction, and then it will be cut to 10. Your business then is entirely at the mercy of the Government official who is in that particular department of the Government, and who is running your business.

Mr. WHITCHER. You would then eliminate every man except a strong financial man, and he would have a monopoly.

Mr. CARLIN. That is what we think.

Mr. WHITCHER. That is one side, but on the other hand, do you want a powerful financial concern to do the business? Is the public satisfied with people who simply put in cheap stuff because they have——

The CHAIRMAN. The people who do not pay their bills and put in cheap stuff would not survive in business very long.

Mr. WHITCHER. In my opinion every trade, and we are in many respects seriously injured financially because there is not large enough business, and they may be seriously injured unless they can have some protection, because there is excessive cutthroat competition.

Mr. CARLIN. You know that the small capitalist has to have a larger percentage of profit than the large corporation with large capital?

Mr. WHITCHER. No; I do not know that in our line, sir.

Mr. CARLIN. Let me illustrate. You have, we will say, $10,000 invested in your business. Now, you have got to live and your family has got to live, and you could not live on a $10,000 investment at 5 per cent and support your family?

Mr. WHITCHER. No.

Mr. CARLIN. But a corporation with a million dollars of capital and a number of stockholders who have their money in other big investment could very easily live on a 5 per cent income from that business.

Mr. WHITCHER. Yes.

Mr. CARLIN. Therefore, you see the small man with small capital must necessarily have a larger profit than is necessary with a large corporation with large capital. Is that not true?

Mr. WHITCHER. Of course, conditions vary in various lines of business. A good many of our small men live in the back of their stores, and all of their family work in the business. Consequently it is very often those men who make the prices. They will make the goods and sell them if they can only make a half a dollar on a sale.

Mr. MITCHELL. They are satisfied with half a loaf if they can not get the whole loaf.

Mr. WHITCHER. Yes.

Mr. CARLIN. This committee wants to help business.

Mr. WHITCHER. Yes; we believe that or we would not be here.

Mr. CARLIN. That is our desire. The question arises, What is the best way to help business?

Mr. WHITCHER. Yes, sir.

Mr. CARLIN. You seem to think the best way is to turn the business over to the Government, and let the Government fix the profit at which the man shall do business?

Mr. WHITCHER. I suppose it would be so if it went as far as that. I know how it has worked in the past.

The CHAIRMAN. How would you stop it when you started in that direction?

Mr. WHITCHER. I think there probably would have to be some regulation of the percentage of profits, according to the line of business.

The CHAIRMAN. You sell those supplies which are used in soling and half-soling shoes?

Mr. WHITCHER. We sell some of those; yes, sir.

The CHAIRMAN. Here is a cobbler who half-soles a pair of shoes, say, for $1, and you consider that reasonable?

Mr. WHITCHER. It is too reasonable. He ought not to do it.

The CHAIRMAN. I am just using that as an illustration. You consider that reasonable, using the best quality of leather, we will say. Suppose the public thinks that 75 cents would be enough, then, this commission would say that he could not charge beyond 75 cents.

Mr. WHITCHER. That is for a different grade of article.

Mr. CARLIN. The same illustration would apply to any grade.

The CHAIRMAN. It does not make any difference about the grade of the article. We are talking now about the power to fix the price. When you concede the power of the Government to fix the price, you are turning over your business to the Government.

Mr. WHITCHER. I realize that, in a sense, it would be better policy for people in our business to turn over their business to Government management rather than lose money in it.

The CHAIRMAN. And have Socialism at once.

Mr. WHITCHER. We do not want socialism.

The CHAIRMAN. Where would there be much individualism remaining when that condition of affairs was brought about?

Mr. WHITCHER. There has been in the past—we have had that privilege up to the time of the last decisions of the Supreme Court, and it worked very well.

The CHAIRMAN. The Government did not fix the price.

Mr. WHITCHER. They prevent the establishment of a price by people making branded and trade-marked goods. Those people do not have any right to protect their reputations. When you have sold those goods, some irresponsible man or some man of no character can take those goods and sell them at 50 cents on the dollar.

Mr. CARLIN. But you do not have to sell to an irresponsible man.

Mr. WHITCHER. I understood there was a law——

Mr. CARLIN (interposing). You do not have to sell your goods to a certain man unless you want to.

Mr. WHITCHER. Are you sure of that?

Mr. CARLIN. Absolutely sure of that. We have a provision here that applies to the products of the mines which does that, but that is as far as anybody has dared go.

Mr. WHITCHER. I can refuse to sell to an individual if he puts the cash money down, because he sells those goods at a cut price?

Mr. CARLIN. Not on the ground that he will cut the price.

Mr. WHITCHER. If I know his reputation to be that?

Mr. CARLIN. You can not make that character of contract. There is no statute which compels you to sell to everybody who applies for your goods, either responsible or irresponsible; but when you commence to contract with a man to prevent price cutting, then you do get into the meshes of the law, because that character of contract is prohibited.

Mr. WHITCHER. Then, how about labor; why not let them be amenable to the law just as we are? You allow labor organizations to go ahead and say to a manufacturer, "You shall not run your mill except in this way."

Mr. CARLIN. That is a large question. Mr. Gompers delivered quite a lengthy address on that subject before this committee, and I commend the reading of that to you. He speaks of their attitude.

Mr. WHITCHER. Our people come now pretty close to the laboring class, and we think we are entitled to the protection that labor interests would be entitled to.

Mr. CAREW. You would be in favor of including them in the exemption?

Mr. WHITCHER. I should be very glad to have them included in an exemption of that sort. If the manufacturers of branded and trademarked goods are not going to be permitted to establish prices for a fair profit, I think our men would be very glad to unionize and get the privilege of getting together to see what profit they can make on their goods.

Mr. CARLIN. You think the Government ought to fix the price of labor?

Mr. WHITCHER. I do not know. I realize this is all tending toward socialism.

Mr. CARLIN. You are a business man, and we have great respect for you and your opinions, and we are trying to find out what just such gentlemen as you are thinking about.

Mr. WHITCHER. I thank you for your kind expression, Mr. Carlin.

Mr. CARLIN. Are you thinking along the line that Government ought to fix the price of labor?

Mr. WHITCHER. No; I am not ready to say that. I am thinking along the line of service to the people.

Mr. CARLIN. If the Government is to fix the price of products of labor, how can that be done without taking into consideration the price of labor?

Mr. WHITCHER. Of course, a proposition to establish minimum wages is something the Government is undertaking. I think the Government has gone too far in all this matter of control. I think the large trusts who are trying to knock out the small people should have a certain amount of regulation, but when it comes down to the question of right of contract or of distribution of goods, competition always regulates the profits which dealers can make, and I think the Government is stepping in too far. I do think you should let us alone and give us the privilege of getting a fair remuneration for our work. There seems to be almost a tendency directly toward socialism.

Mr. CARLIN. Without intending any disrespect to you or the gentlemen you represent, that is the principle of the highwayman; all he asks the Government to do is to let him alone. He will take

care of himself, and he will get a proper reward for his efforts. On the other hand, the public demands that they should be protected from a fellow who thinks he should be left alone.

Mr. WHITCHER. But the public wants the service. The public does not want to have delivered to it goods which are made to represent the genuine article and which they suppose is the genuine article, but which is sold for a good deal less price than the genuine article brings.

Mr. CARLIN. If you had the power to write a statute to remedy these evils with which you are familiar, what would you write into the law?

Mr. WHITCHER. You mean regarding these men that I have been talking about?

Mr. CARLIN. Regarding business generally, including them?

Mr. WHITCHER. I would want to consider that very carefully before committing myself.

Mr. CARLIN. Will you do that and send it to us? Draw such a statute as you think will cover that; suppose you draw a tentative statute.

Mr. WHITCHER. I think I would have to ask to be excused from doing it here.

Mr. CARLIN. Suppose you do that, then, after you return home, and send it to the clerk of the committee, so that the committee may have your ideas on that subject.

Mr. WHITCHER. I will endeavor to do that. I think I am taking up too much of your time, gentlemen. I trust you will pardon me for doing so.

I do feel and want to instill in your minds the fact that there is another side to this question; that the dealer needs some protection in order that he may render the best service to the public, so that the public may receive honorable goods and reliable goods, similar to what it has been getting in the past, without forcing down the quality and forcing down the price, which comes from cutthroat competition.

(Thereupon the committee took a recess until 2 o'clock p. m.)

AFTER RECESS.

The committee reassembled, pursuant to the taking of recess.

The CHAIRMAN. The committee will hear this afternoon from Mr. A. G. Thomas and one or two other gentlemen, from Sandy Springs, Md.

STATEMENTS OF MESSRS. A. G. THOMAS, CHARLES KIRKE, AND J. W. JONES, OF SANDY SPRINGS, MD.

The CHAIRMAN. We are very glad to have you with us, gentlemen. Mr. Thomas, you are a banker, and I suppose you have come this afternoon to talk about the bill relating to interlocking directorates?

Mr. THOMAS. Yes, sir.

The CHAIRMAN. We will be very glad to have you make your statement in your own way.

Mr. THOMAS. I am sure you have had representatives of large corporations before you, and I come to you this afternoon to speak in

behalf of the small national banks in rural communities, and I will cite my home bank as an example. I live only 18 miles from this city, in Montgomery County, Md.

The CHAIRMAN. What is your town?

Mr. THOMAS. We have a little village at Sandy Springs, Md., with a population of about 40 people.

The CHAIRMAN. Where is your bank located?

Mr. THOMAS. At Sandy Springs.

The CHAIRMAN. What is the capital stock of your bank?

Mr. THOMAS. $25,000.

The CHAIRMAN. It is a national bank?

Mr. THOMAS. It is a national bank; and we have deposits of about $100,000.

The CHAIRMAN. Your community is a farming community?

Mr. THOMAS. Yes; it is. My family have been there for about 200 years. There is no industry or manufacturing or commerce there; there is no monopoly or anything that would be affected by the bill before you.

We have there simply a small national bank, and I want to explain the situation we are in.

We had, about 45 years ago, an old savings institution there with 26 directors. We are not allowed to loan a cent to any director, and we never have during all these years. We are required to invest our money in lands and mortgages in the county or State, municipal or railway bonds. Our savings bank is only open two days in the week for business.

We are not allowed to discount paper, and we can not do a business that a commercial or a national bank does. That has been going along there for a long time, and the bank has been going along in a very prosperous condition.

We have been loaning money to the community, to hundreds of people, and it has been a great aid to them in helping them to pay for their homes or for their farm implements and things of that kind, and also has furnished them with a means for a safe place for a deposit of their funds.

We have always paid 4 per cent. We have not any capital. All our surplus belongs to the book holder.

About 10 years ago we needed a commercial bank, and we started this small national bank in a community there where there are no capitalists, and where there are not many men fitted to be bank directors, where it is pretty hard to get enough directors to serve; and when you take 26 men in a community like ours you get almost everybody capable of doing any business.

We started our national bank with nine directors, and three of those are directors in the old savings-bank institution under a State charter. As far as I can see, from the conditions of the bill now pending before your committee, we can not hold these positions, if I read the bill correctly. We would like to impress that upon you.

Mr. CARLIN. What savings bank are you a director in?

Mr. THOMAS. The old savings bank at Sandy Springs.

Mr. CARLIN. How much money have they?

Mr. THOMAS. They have deposits of a million dollars. They have been very successful. That bank is in a community 10 miles from a railroad.

Mr. CARLIN. And it is a community with 40 inhabitants?

Mr. THOMAS. Yes; with 40 inhabitants.

The CHAIRMAN. And your national bank has only $25,000 capital?

Mr. THOMAS. That is all we have.

The CHAIRMAN. What are the deposits in the commercial bank—in the national bank?

Mr. THOMAS. About $100,000. The banks are entirely separate. We keep our banks entirely separate.

Mr. CARLIN. There is no stock in the savings bank?

Mr. THOMAS. None at all, and the deposit is limited. The limit is placed at $500 a year, and the maximum is $4,000. You can not deposit more than $5,000 in that bank, so that is a kind of close corporation.

The point is that there are a great many other places similarly affected. There are thousands of these small banks that are affected as we are. If we should separate, as proposed in this bill, it will almost cripple one of the banks, because we have not a sufficient number of capable men to fill the places as directors. That is a point we would like you to consider.

Mr. CARLIN. We have a case of this kind in a national bank: A bank has $100,000 capital and has on deposit $1,400,000.

Mr. THOMAS. That is not in a rural community?

Mr. CARLIN. No; that is in New York.

Mr. THOMAS. I am speaking for the rural communities. I think there ought to be an exception made, in the case of a capital of $50,000 and under, in a rural community, because we are doing exactly for the farmers what the new proposed rural-credits law is proposed to do. We loan to whoever wants to borrow for anything; when they need money we loan it to them.

Mr. CARLIN. What do you do with that $1,000,000 you have in the savings bank?

Mr. THOMAS. We loan it. I have here a copy of our last statement. We have about $200,000 in railroad bonds, about $150,000 in State, county, and municipal bonds and some industrial bonds, but not a very large amount of industrial bonds. We have been very successful there. We are strictly a farming community. There is no business there at all except country stores and a few county mills that grind some of the wheat. We do not loan to persons in the city on notes. All our business is confined to our citizens, so far as the national bank is concerned, and we have gotten along very well.

Mr. CARLIN. I never would have suspected that you had a million dollars on deposit there.

Mr. THOMAS. To the credit of the community I will say that we have deposits in this little bank in 15 States in the Union. We have a deposit in San Francisco. We had a deposit in China last year. We have a deposit in New Orleans and one in Boston, and all along this coast. There are a great many boys raised in Sandy Springs, and there is nothing there for those boys to do but farming, so those boys go out in different parts of the country. We raise the boys and send them out in different parts of the country. I suppose there are 75 or 100 of them who have gone from Sandy Springs, and they know the class of people that live there. We are an economical plain

people, and these men outside in the different States know what a sturdy community that is.

Mr. KIRKE. Sixty per cent only can be invested in farm mortgages in Montgomery County.

Mr. THOMAS. That has been criticized by a good many people.

Mr. CARLIN. How many of the men who are directors in the savings bank are also directors in the national bank?

Mr. THOMAS. I think there are five.

Mr. CARLIN. And the savings bank has 26 directors?

Mr. THOMAS. They had 26 originally. They have died off until now there are only 20.

Mr. CARLIN. And how many directors are there in the national bank?

Mr. THOMAS. There are 11. That makes 31 men all together who are directors in the two banks.

Mr. CARLIN. And six of those men would be all that would be affected?

Mr. THOMAS. Yes; I think six would be all that would be affected.

Mr. CARLIN. In the exercise of your option of being a director in either one or the other, your idea is that six men would leave the national bank and stay in the savings bank?

Mr. THOMAS. We would not know what to do. I went to see the new Comptroller of the Currency, Mr. Williams, who is a personal friend of mine, and I asked him what the result would be, and he said, "You will have plenty of time to straighten that out." I said, "When a man is dead he has not plenty of time to straighten it out."

Mr. CARLIN. You are given two years.

Mr. THOMAS. I know that. I do not know what we would do. I am in both banks.

Mr. CARLIN. Do the directors in the savings bank receive any salary?

Mr. THOMAS. No. There is a small per diem.

Mr. CARLIN. That is for attendance upon the meetings?

Mr. THOMAS. Yes; when they attend the meetings. We do not pay very large salaries. We served for nothing for a great many years.

Mr. CARLIN. Do the directors in the national bank receive a per diem?

Mr. THOMAS. They receive a small per diem. We supervise and take care of the funds of a great many people who can not take care of their own, very largely children and widows and workingmen. We have about 3,500 pass books, and a large number of our depositors are very small depositors. We are started for that purpose, and we have been quite successful. We are a plain, economical people.

Mr. CARLIN. Would it meet your approval if we would exempt savings institutions?

Mr. THOMAS. That would help very much to solve it. There are quite a number of national banks throughout the county.

The only objection I have to the currency bill is that we are required in our county to contribute so much to the capital stock of the reserve bank, and that takes that much out of our community which we could keep there and loan to the people who need it. That is the only objection I have to the currency bill. It seems to be

taking it from the rural community and concentrating it in these large banks.

Mr. KIRKE. I would like to ask whether there would be any line drawn in regard to small banks in rural communities?

Mr. CARLIN. Oh, yes. If we should except savings institutions, that would meet your case?

Mr. THOMAS. Yes; but at the same time, that is not the only case, because throughout the country there are hundreds of these little banks that will suffer as well. I know of some in Carroll County and one in Frederick County.

Mr. CARLIN. If they were to suffer the same as you may suffer from interlocking directorates in savings institutions——

Mr. THOMAS (interposing). There are also trust institutions.

Mr. CARLIN. How old is your savings institution?

Mr. THOMAS. Forty-five years old.

Mr. JONES. We do not and have not loaned a dollar to a director.

Mr. THOMAS. We publish a statement every year and everybody sees what we are doing. We are examined thoroughly.

Mr. CARLIN. You have 40 inhabitants in your community, and 31 directors in the two banks, and a million dollars on deposit in one of the banks.

Mr. JONES. There are only 40 inhabitants in the village of Sandy Springs.

Mr. CARLIN. Sandy Springs has 40 inhabitants?

Mr. JONES. Yes, sir.

The CHAIRMAN. You may proceed with your statement in your own way, Mr. Thomas.

Mr. THOMAS. I do not think what we are doing there would come under the conditions that this law is supposed to cover. We are not doing anything there in violation of any law in regard to the restraint of trade. There is no combination, we could not have a combination, and it does not seem to me that we ought to come under this sweeping law, as we are not doing any harm.

The CHAIRMAN. You mean the law prohibiting interlocking directors?

Mr. THOMAS. Yes, sir; the law prohibiting a man from being a director in the old savings bank and in the national bank.

The CHAIRMAN. How many directors of the national bank are also directors in the savings institution?

Mr. THOMAS. I think there are five.

The CHAIRMAN. Each concern has five directors?

Mr. THOMAS. No. We have 11 directors in the national bank.

The CHAIRMAN. You have 11 directors in the national bank?

Mr. THOMAS. Yes; and 20 in the old savings institution. Last year the average age of the directors was 72 years, and so I think we may safely say that Osler is not always correct in his theory.

Mr. CARLIN. The capital of the bank does not always represent its operations.

Mr. THOMAS. No.

Mr. CARLIN. That is what I meant when I referred to the bank with $100,000 capital and $1,400,000 deposits. So it would not reach the evil to exempt the banks of certain capitalization, because a bank with a small capitalization may have enormous deposits.

Mr. THOMAS. Yes: that is true.

Mr. CARLIN. Nobody wants to hurt a rural bank; we want to help them; but the difficulty is to get a rule of action based upon any concrete proposition that does not affect them after all. If we were to leave it to the capital—take your savings institution, which happens not to have any capital stock; if it had any capital it would be a small capital.

Mr. THOMAS. Yes.

Mr. DANFORTH. What is the nature of the savings bank in your community?

Mr. THOMAS. We are chartered under the State law.

Mr. DANFORTH. What is the State law? Are you a money-making institution?

Mr. THOMAS. No.

Mr. DANFORTH. Have you any stockholders?

Mr. THOMAS. No.

Mr. DANFORTH. It is what is known as a mutual savings bank for the benefit of the depositors?

Mr. THOMAS. Yes; everything belongs to the depositors; it is not a money-making institution at all.

Mr. DANFORTH. And the directors do not receive any salary?

Mr. THOMAS. The active ones do; the president and secretary and treasurer do.

Mr. DANFORTH. The officers do, but not the directors?

Mr. THOMAS. Yes; they receive a per diem for attending the meetings.

Mr. DANFORTH. That is, the executive committee?

Mr. THOMAS. Yes; the finance committee. The directors meet quarterly and receive a per diem, a small per diem.

Mr. CARLIN. They are debarred from borrowing any money from the institution?

Mr. THOMAS. Yes.

Mr. DANFORTH. You do not loan money on anything but bonds and mortgages?

Mr. THOMAS. That is all.

Mr. DANFORTH. You do not do that, even, with your own directors?

Mr. THOMAS. No; a director can not give a mortgage.

Mr. DANFORTH. That is like the law we have in New York State.

Mr. THOMAS. Yes; I believe it is.

Mr. CARLIN. Have you any idea how many institutions such as yours exist in this country?

Mr. THOMAS. You mean the savings banks?

Mr. CARLIN. Yes; a savings bank on the cooperative plan.

Mr. THOMAS. Our bank was copied really from the old savings bank of Baltimore; we took our rules from the rules of that old bank. We are only open two hours a day twice a week—on Monday and Thursday afternoon from 2 to 4 o'clock. That is the only time we are open to the public.

Mr. CARLIN. They can only make deposits during those hours?

Mr. THOMAS. Yes; they can only make deposits during those hours. Of course, a good deal of business is done by check and mail, but that is the only time we are open, and our national bank is only open four hours in the morning; it is not open in the afternoon at all.

The CHAIRMAN. What is your idea in limiting the amount that anyone may deposit to $500 a year?

Mr. THOMAS. Because we do not want to have to take care of the money of parties who are able to take care of their own. We originally started with the purpose of caring for the money of the laboring people, or widows or children who could not take care of their own money. If a man has three or four or five thousand dollars he can generally invest it in a good mortgage himself. We do not take over $4,000 at any time. The interest can accumulate as long as the depositor chooses to allow the money to remain in the bank. We have stuck to that rule for 45 years, and we have gotten a good deal of money even with that rule. The secret is that when it once goes in there it usually stays.

Mr. CARLIN. It so happens that just now there came from a banker in Utica, N. Y., a similar request, relating to savings institutions, and he submitted a brief on that subject. We did not have in mind the savings institutions when these tentative drafts were put out to the public.

Mr. DANFORTH. You mean the mutual savings institutions. There are in the West institutions under the name of savings banks which really do a discount business.

Mr. CARLIN. Those are different concerns, but we did not have in mind the mutual cooperative association.

Mr. THOMAS. There are some in the States.

Mr. CARLIN. They are run for profit?

Mr. THOMAS. They are run for profit.

These other institutions, the mutual institutions, are run to help the people; it is more on the order of a charitable institution. There was nothing paid for many years to any of the directors or anyone else.

We are very fond of that bank. We often stop work on our farms to see if the bank is properly run.

Mr. DANFORTH. Does not your Maryland State law limit the amount of deposits a savings bank may take?

Mr. THOMAS. I did not catch your question.

Mr. DANFORTH. I asked you whether your Maryland State law does not limit the amount of deposits a savings bank may take?

Mr. THOMAS. No; I think not.

Mr. DANFORTH. You may take an unlimited amount?

Mr. THOMAS. Some of the Baltimore banks have as much as $15,000.

Mr. DANFORTH. Does not the law limit the total amount an individual may deposit?

Mr. THOMAS. I think not.

Mr. DANFORTH. The New York State limit is $3,000.

Mr. THOMAS. Yes; I think it is. I am quite familiar with the savings institution near Boston, which is similar to ours.

Mr. DANFORTH. I believe Massachusetts has the same kind of a law.

The CHAIRMAN. Is there anything else you desire to say, Mr. Thomas?

Mr. THOMAS. No, Mr. Chairman; I think not.

The CHAIRMAN. You want to be allowed to have your directors who are directors of your national bank to be also directors in your savings institution?

Mr. THOMAS. Yes; of the mutual savings institution. Of course, if you can not draw a line as to the location and capital of national banks, we would be glad if you would relieve us in that way.

Mr. CARLIN. What do you think of the principle of preventing interlocking directors?

Mr. THOMAS. I think it is a good plan where monopolies are formed, in the case of large cities and large corporations. I am very glad to say that some of the directors think they have been directors in the institution long enough and are getting out.

Mr. KIRKE. Would anything be achieved by not allowing the directors of national banks to borrow from their own banks?

Mr. CARLIN. It would go a long way. On the other hand, that would drive out directors in many communities.

Mr. DANFORTH. There is a limitation on it now.

Mr. CARLIN. They can only borrow up to 10 per cent of the capital.

The CHAIRMAN. Is there anything more you desire to say, Mr. Kirke?

Mr. KIRKE. I think, Mr. Chairman, Mr. Thomas has covered the subject pretty thoroughly. I am led to hope, if you can not see any way by which you can limit capital, taking into consideration the fact that they are in a rural community—if you can not see any way to arrange that I would be glad if something could be done in the way of relieving these mutual savings banks.

Mr. THOMAS. We do not altogether like to be classed with the people who have the opportunity to do and are doing wrong.

Mr. CARLIN. If the evil we are trying to remedy does not reach the rural community, the rural community is not injured at all, but if it does reach there it ought to be remedied there as well as elsewhere.

Mr. THOMAS. That is the only objection I see to the law. You include people who have not had any possible chance for doing wrong, even if they wished to do so.

The CHAIRMAN. If this exception were put in the bill—if we put a clause in like this, "And a person who is a director in any State bank other than a mutual savings bank having no capital stock"—you think that would meet the case?

Mr. THOMAS. That would cover our case very nicely, and if that is the best you can do, we will be very glad to have you do that.

Mr. CARLIN. You think the rural national banks ought to be excepted?

Mr. THOMAS. Yes; I do. In many communities there are so few people who are capable of managing a bank that I think an exception should be made in that case. That is the trouble with a great many banks. We have not any capital at all outside of our community. No capitalist has anything to do with us. We are doing a great deal of good to the community where we are located. We are furnishing the money to lend just exactly where it is needed, among the agricultural people.

Mr. CARLIN. Does your savings institution lend your national bank any money?

Mr. THOMAS. No; we do not deal with each other. We keep separate accounts entirely. We are so separate that we do not keep an account with any of the banks in New York. I mean the two banks do not keep accounts in the same bank in New York.

Mr. CARLIN. What rate of interest does your savings bank pay?

Mr. THOMAS. Four per cent.

Mr. DANFORTH. If this bill, as it is drawn, against interlocking directorates were enacted into law, are there enough citizens in your town to enable you to have dummy directors, so that you can still continue to do business in both banks?

Mr. THOMAS. I do not know much about dummy directors.

Mr. DANFORTH. You could put your sons in as directors in the national bank, and have them do business under your instructions.

Mr. THOMAS. Would that be allowed? I would not know what to do if we were called upon to make the separation.

Mr. DANFORTH. Would you not feel that it was enough of a family affair if you put your son in the institution in which you were the less interested?

Mr. THOMAS. A son can not always do what his father has been doing.

Mr. DANFORTH. Do you not think if you put your son in there he would be liable to do what you instructed him to do?

Mr. THOMAS. It might be said that there were too many people of one name connected with the two institutions.

Mr. CARLIN. The son might be as hard-headed as the father, sometimes.

Mr. DANFORTH. You could in that way really keep up your family interest in the two institutions?

Mr. THOMAS. Yes; we could do that.

Mr. DANFORTH. My question was simply asked to see if it did not occur to you that the dummy-director business would interfere very seriously with the effectiveness of this provision.

Mr. THOMAS. Suppose we were to go out of the national-bank system entirely and start a State bank. Would this law affect us?

Mr. CARLIN. No.

Mr. THOMAS. We do not want to do that. We want to stay in the national-bank system.

Mr. KIRKE. The national bank meets the requirements of the community there. We want to remain in the national-bank system.

(Thereupon, at 3.30 o'clock p. m., the committee adjourned until to-morrow, Wednesday, February 11, 1914.)

TRUST LEGISLATION

UNIV. OF MICHIGAN

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

SIXTY-THIRD CONGRESS

SECOND SESSION

ON

TRUST LEGISLATION

Serial 7—Part 10

STATEMENTS OF

HON. HERMAN A. METZ
HON. THOMAS F. KONOP
MR. EBEN R. MINAHAN
MR. CHARLES H. JONES
MR. WILLIAM DRAPER LEWIS
MR. DONALD R. RICHBERG
HON. HERBERT KNOX SMITH

FEBRUARY 11, 1914

WASHINGTON
GOVERNMENT PRINTING OFFICE
1914

CONTENTS.

Statements of:	Page.
Hon. Herman A. Metz	359
Hon. Thomas F. Konop	364
Mr. Eben R. Minahan	364
Mr. Charles H. Jones	384
Mr. William Draper Lewis	415
Mr. Donald R. Richberg	389
Hon. Herbert Knox Smith	422

COMMITTEE ON THE JUDICIARY.

HOUSE OF REPRESENTATIVES.

SIXTY-THIRD CONGRESS.

HENRY D. CLAYTON, Alabama, *Chairman.*

EDWIN Y. WEBB, North Carolina.	JOHN F. CAREW, New York.
CHARLES C. CARLIN, Virginia.	JOHN B. PETERSON, Indiana.
JOHN C. FLOYD, Arkansas.	JOHN J. MITCHELL, Massachusetts.
ROBERT Y. THOMAS, JR., Kentucky.	ANDREW J. VOLSTEAD, Minnesota.
H. GARLAND DUPRÉ, Louisiana.	JOHN M. NELSON, Wisconsin.
WALTER I. McCOY, New Jersey.	DICK T. MORGAN, Oklahoma.
DANIEL J. McGILLICUDDY, Maine.	HENRY G. DANFORTH, New York.
JACK BEALL, Texas.	LEONIDAS C. DYER, Missouri.
JOSEPH TAGGART, Kansas.	GEORGE S. GRAHAM, Pennsylvania.
LOUIS FITZHENRY, Illinois.	WALTER M. CHANDLER, New York.

J. J. SPEIGHT, *Clerk.*

TRUST LEGISLATION.

SERIAL 7, PART 10.

COMMITTEE OF THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
Wednesday, February 11, 1914.

The committee this day met, Hon. Henry D. Clayton (chairman) presiding.

The CHAIRMAN. Representative Metz desires to be heard briefly this morning. The committee will now be glad to have him give his views.

STATEMENT OF HON. HERMAN A. METZ, MEMBER OF CONGRESS FROM NEW YORK.

Mr. METZ. Mr. Chairman and gentlemen, I will not take up much of your time, but I did want to touch upon the question of fixing prices. I have listened to the discussion here the past day or two on that subject with much interest—the question of whether an owner of a patent or trade-mark has a right to fix a retail price, and I want to point out that where such owner fixes the price it is an advantage to every one and not a detriment, and whether a prohibition, as "enacted" by the Supreme Court recently, is a handicap upon every one interested, there seems to be no doubt.

Take the case of drugs—pharmaceutical preparations. A patented drug is protected to the extent that it can not be manufactured by anyone else, except some things which come in from Switzerland and France. That, of course, is a matter of civil action, that any patentee has a right to pursue and get his redress, but there is a

custom in existence by which it has been the practice to fix the wholesale and retail selling price and the consumer's price on these products. The wholesaler is the distributor. The drug house can not distribute direct to the physician such an article as that. The transportation, etc., of course, and the number of accounts to be carried stands in the way, and therefore he distributes to wholesale druggists. The usual price fixed to the retailer is 10 per cent off to those who handle a quantity, and to those who do not handle a quantity 10 and 5. That is what it usually costs to do that business. The wholesale drug house buys that in bulk, puts it up in smaller packages and ship it with other goods, and in that way help the retail drug stores. The retailer is supposed to maintain a price to the physician on those products that go into direct consumption. That is the uniform rule. We get complaints right along from druggists that so and so is handling our goods at less than the prescribed price. We reply, "Sorry, but we can not do anything." It does not affect us. In saying "us," I mean the holder of the trade-mark or patent right. If our goods are called for they will be sold anyway, but it hurts the retailer in the first instance. The goods are handled by dry-goods houses, department stores, and syndicate drug stores. The result of not allowing a fixing of the price tends to demoralize everything. We are striving to prevent monopoly. The retailer can not buy the quantity that even the syndicate drug stores buy. They act as wholesale distributors. They go direct and get the wholesale druggist's price and freeze out everybody by selling at the cost. The result is that the smaller dealer is being driven out all along the line, but particularly in this branch of business. The consumer usually gets his stuff in a prescription. He does not know the first cost of these things; he does not care; it does not interest him. He gets it in small quantities in connection with other goods in a prescription.

Those goods are also trade-marked and sold to the layman as so-called patent medicines which are not really patented at all. He pays a certain price, say, a dollar a bottle; that is one of the cases cited by the Supreme Court. The dry-goods house begins to sell at 89 cents, and the drug store is put out of business. We are grumbling about drug stores being fancy-goods dealers and not pharmaceutical, and about their being compelled to carry everything else. He can not get a dollar for a bottle of medicine because the dry-goods store is selling it at 89 cents.

This is the line with which I am familiar. It does not hurt the owner of the trade-mark or patent, because that article must come from him, whether he sells it to the legitimate wholesaler and through the retailer or to the jobber direct or the large-buying retailer; but the tendency of allowing them to go beyond the prescribed price, which is fixed on a basis to give them all a chance to make a living, tends to drive the little fellow out. In Germany there is a fixed rate, which must be allowed the pharmacist on the drugs, who in that case is a druggist purely. They make a profit on the quantity price to wholesalers, who have an advantage of 15 per cent over the retailer; that is rather, the jobber who sells the retail druggist; and the retail druggist has a privilege 40 per cent. The German Government allows him that, and it costs a lot to do business. In this country there is no such limitation. Anyone can get a license to practice

as a pharmacist. All he needs to do is to go to the State board of pharmacy, take the examination, and he can open a drug store. In Germany the Government prescribes what shall be allowed this retailer to handle his goods. The result is that everyone is protected. Here in this country, after a man has passed the State board of pharmacy and opened a drug store, the department stores come in and drive him out. The consuming public has no advantage of any kind from the legitimate products. It might get an advantage on the advertised stuff, such as the so-called patent medicines, by buying them a little under, and I think if the laws on that were restricted it would be better. There is one instance, at least, where the fact that you can not fix a price does not benefit everyone, but hurts everybody connected with the trade, except the one original. The patent law has given him a monopoly and the trade-mark has given him a monopoly and a lot of other things.

If a man has a copyright or a trade-mark he must have established it. He can not establish a trade-mark overnight, because it costs money; he must have a peculiar quality of goods and advertise them, and he ought to be able to get his money back in some way. If your price is prohibitive and you have something on which the price is exorbitant, some one else with a similar article can come along without a trade-mark, and undersell you. That is legitimate competition. The man who has established a copyright or trade-mark ought to have the right to fix the retail price to the consumer. He can not get any damages, but he can stop selling him the product if he will not maintain the price, as I pointed out. There is another danger in drugs especially, that job lots of drugs which have been lying around and have become spoiled, possibly, or of uncertain quality through age, may be peddled out at a low price, and very often great danger results, and great damage is done; whereas if the price was maintained the dealer would have no object in selling below the fixed price. He could return it and get decent goods and protect the public. It is the cut-price fellow who goes into the market that hurts more than anything else, and I simply want to bring that before you, how to differentiate between an article that is not consumed and one that goes into the body for purposes of health or as food, whereas rubber heels or things of that sort are different. I do want to point out one instance where they ought to be allowed to maintain price, and that is in regard to patent products of that sort, where the ultimate consumer comes in and gets a thing in small doses in the way of a prescription, and the fact that the price is not maintained to the manufacturer and the middleman, who is the legitimate man to put these goods out to the consumer.

That is all I have to say, and I thank you for the opportunity to be heard.

Mr. DANFORTH. What is your remedy?

Mr. METZ. That is up to you. I do not know. But do not stop us from fixing a price, and I will handle the matter so far as my business is concerned, if I can refuse to sell a man who will not maintain that price.

Mr. DANFORTH. What suggestions have you to give the committee?

Mr. METZ. If you make a law that will not allow it—they stopped it under the Sherman law, I believe. I heard Judge Adamson yesterday in the Committee on Interstate and Foreign Commerce say,

"Consult a lawyer and find out." What lawyer's opinion is worth a continental? I can not rely upon their advice. I am the man to go to jail. When the Supreme Court decides five to four that a statute is wrong to-day and two years ago they would not have dared to decide that you can not fix a price on trade-mark or patented goods, although here recently by a five-to-four decision it was done. Suppose one judge should change his mind, which would not be likely, but that law was changed by a five-to-four decision. I will concede you have no business fixing a price on free goods in open competition, but nobody would have thought before the rendition of that decision that you could not fix a price on a trade-marked product; but you see the result when the Supreme Court decides, five to four. There are two lawyers among them, and one guessed right. If possible, make it clear, so we will know where we are at; give us permission to fix the price, then there will be no question.

Mr. VOLSTEAD. If we give you that permission, why should we not give it to everybody else?

Mr. METZ. On all patent goods you ought to, and I want you to consider that I do not mean my own goods only.

Mr. VOLSTEAD. The patented article has an advantage over every other article. Why should we give it an advantage beyond that?

Mr. METZ. Why not give him a real advantage?

Mr. VOLSTEAD. You have the advantage. You have the monopoly in the manufacture and sale.

Mr. METZ. I have the monopoly and the trade-mark, but the other man—the middleman—who has the right to handle this, has no protection and is driven out of business.

Mr. VOLSTEAD. If you get it, the farmers ought to have it.

Mr. METZ. If they have the same goods, they ought to have it.

Mr. VOLSTEAD. They can trade-mark even flour.

Mr. METZ. Certainly; and if you can make a name for your floor, you have a right to get the benefit of that. The trade-mark is not a mere name; it is the making of the name known.

Mr. VOLSTEAD. Would that not be simply legislating to create a monopoly?

Mr. METZ. No; you have given a monopoly when you give a trade-mark or a patent. That is why I get a patent.

Mr. VOLSTEAD. You have a monopoly of the trade-mark, but you may not have much of a monopoly when you get out in the sale of your goods.

Mr. METZ. If I can sell at a fixed price and make it known, I have a monopoly, but the mere giving of the trade-mark is not a monopoly. I ought to be able to go further and say at what prices those goods shall be sold. If I sold direct to the retailer, I could fix the price. I know there is a saying that when you part with the goods the man who buys them may do what he pleases with them, and that seems logical. The retailer buys from the jobber; I can fix my price to the wholesaler and hold it, but he wholesales it to the retailer, and the court has held that you can not fix it beyond a certain sale. There is logic in that, undoubtedly, but the effect on me is what I am looking at.

Mr. DYER. Is not that good reasoning and good sense?

Mr. METZ. Suppose I sold to the retailer direct and did not have a middleman, then I could do it.

Mr. DYER. You could fix your price to the retailer if you sold direct to him?

Mr. METZ. Certainly.

Mr. DYER. But you could not govern his price?

Mr. METZ. You can not do this business direct. I can not distribute in every little town in the country. If I did the retailer would pay 10 times more for it than he does now. He would pay all the charges overhead; he would pay all the charges for transportation. You have got to have jobbers; you have got to have the wholesaler to break up the package and ship the goods with other goods. He is the one I am trying to look out for; and I also want to protect the retailer against the dry-goods house and the department store, and the cutter and the fakir who also get in that business, by driving away from him the business he ought to have and sending it in other channels. It is a difficult question, but one we ought to consider.

Mr. VOLSTEAD. We ought to have the information.

Mr. METZ. I am giving you the information. That is one point; how to handle it is another. I have no fault to find with the court.

Mr. CARLIN. May I ask you a question?

Mr. METZ. Certainly.

Mr. CARLIN. In buying your goods, you want to buy in a competitive market, do you not?

Mr. METZ. We do not buy these goods, we produce them.

Mr. CARLIN. You buy the ingredients with which you produce them?

Mr. METZ. Oh, naturally; the raw materials.

Mr. CARLIN. You want to buy in a competitive market?

Mr. METZ. Certainly; we have to.

Mr. CARLIN. Your position is that when you sell you want to sell in a noncompetitive market?

Mr. METZ. Because of the restrictions I have under the patent or under the trade-mark.

Mr. CARLIN. Anybody can get a trade-mark.

Mr. METZ. Ah! But it is worth nothing unless I can demonstrate it and prove it.

Mr. CARLIN. Why not have trade-marks for everything?

Mr. METZ. If you had a certain trade-mark on a hat and you wanted $5 for it, and I saw another for $3, I would buy the $3 hat in a minute. You have a name for your hat; and you have got to have money to do it with. If you are a clever advertiser, and I am fool enough to believe your ad and want your hat, I ought to have to pay for it.

Mr. CARLIN. Your position is that you would not want a monopoly created for the fellow from whom you buy, but you want us to create a monopoly for you?

Mr. METZ. If in the same position, certainly I would, on the same goods. If he had a thing which is trade-marked, I am willing to pay the price. If everyone pays the same price no one is injured.

Mr. CARLIN. It does not make any difference to you what the price is?

Mr. METZ. With everyone paying the same price, I do not care.

Mr. VOLSTEAD. The consumer would be injured by it.

Mr. METZ. He need not buy my stuff; he is not compelled to.

Mr. VOLSTEAD. If everybody charged the same?

Mr. METZ. That is the point. No one is injured, and the price regulates itself. When you get beyond a reasonable profit somebody else is going to come up and take the business.

I want to protect the man who is the legitimate distributor and nobody else, that is all. You are driving into monopoly by giving these big fellows who have opportunity to buy quantities, and then you say you should not fix the quantity price. Why should the man who buys one package pay the same price as the man who buys 100? That is what the "Seven sisters" bill in New Jersey does. You must simply consider the cost of transportation. You would put everybody out of business. You can not make every large man a distributor direct to the consumer. You have got to have middlemen. It is like a prescription for the drug store; certain things must go that way, and it is to protect that man, and protect the public, and the fixing of the price would help rather than having the price unrestricted.

If you have that point, that is all I want to say. I thank you for the hearing.

STATEMENT OF HON. THOMAS F. KONOP, MEMBER OF CONGRESS FROM WISCONSIN.

Mr. KONOP. Mr. Chairman, I want to present to you this morning Mr. Eben R. Minahan, of Green Bay, Wis., who represents the independent oil men, and who wishes to discuss some phases of the proposed legislation.

The CHAIRMAN. We will be very glad to hear him.

STATEMENT OF MR. EBEN R. MINAHAN, GREEN BAY, WIS., ATTORNEY FOR BARKHAUSEN OIL CO.; ALSO REPRESENTING THE WESTERN JOBBERS' ASSOCIATION AND THE INDEPENDENT PETROLEUM MARKETERS' ASSOCIATION.

Mr. MINAHAN. Gentlemen of the committee, I represent particularly the Western Jobbers' Association and the Independent Petroleum Marketers' Association. Both of these are associations of independent oil jobbers and distributors, men who engage in the buying and selling of petroleum products. We thought of coming here principally after reading Mr. Stanley's bill, H. R. 12121, and I shall address most of my remarks to the provisions of that proposed bill. I did not know until this morning of the rather similar provision in the bill 12123, which I believe is Judge Clayton's bill. That also contains a provision prohibiting price-cutting, but I am not familiar with that provision and its connection——

Mr. FLOYD. What is the number?

Mr. MINAHAN. No. 12123, page 313, of the document you are looking at.

Mr. FLOYD. The other bill introduced by the chairman of the committee?

Mr. MINAHAN. That is 12123. I do not know the page.

Mr. MCGILLICUDDY. Page 319.

Mr. FLOYD. That was not introduced by the chairman.

Mr. MINAHAN. I see. At any rate, that is the one I meant. My attention was called to it by reading, while I sat here, the minutes of Mr. Bennett's statement to this committee a couple of days ago.

Mr. FLOYD. Both of those bills were introduced by Mr. Stanley.

Mr. MINAHAN. My first proposition, gentlemen, that I want to be kept in mind in considering Mr. Stanley's bill (H. R. 12121) is that an antidiscrimination law is necessary to prevent business from crushing competitors by the practice of local price cutting, independently of the corporation or person entering into any contract or combination in restraint of trade. In this Stanley bill, which I am talking about, it is provided that if it be established that any person, firm, or corporation has entered into any contract or combination in restraint of trade then it shall be unlawful as to any of such persons, firms, or corporations which shall discriminate by selling at a lower price in one locality than in another for the purpose of injuring a competitor, after making due allowance for the difference in grade, quality, or quantity and in the cost of transportation; and I wanted to call the committee's attention to a proposition with which you may be perfectly familiar—but I want to mention it, nevertheless, to be sure—that a person, firm, or corporation may be large enough and strong enough so that it can injure and crush a competitor by a local price cutting, irrespective of whether such person, firm, or corporation has entered into any contract or combination in restraint of trade. In other words, I want it to be kept in mind that the contracts and combinations in restraint of trade are one and a distinct method of acquiring a monopoly, and that local price cutting is another and equally distinct method of creating a monopoly; and, as a matter of fact, the one is older than the other. In fact, as was pointed out by the South Dakota Supreme Court when their local statute was held constitutional, the one is really the result of the other. I refer to the case of State *v.* Central Lumber Co.

Mr. VOLSTEAD. What is the citation?

Mr. MINAHAN. One hundred and twenty-third Northwestern, 504, South Dakota. That case went to the Supreme Court of the United States (vol. 226, 157), and only a year ago was affirmed, and the constitutionality of that State statute was thereby affirmed.

I refer you to the language of Judge Whitting, of the Supreme Court of South Dakota:

Mr. CARLIN. Is your proposition that you want to prevent local price cutting?

Mr. MINAHAN. That is my proposition.

Mr. CARLIN. What is your remedy?

Mr. MINAHAN. The very sort of statute that is contemplated by this bill, except that it be not limited to price cutting by one who has entered into a contract or combination in restraint of trade.

Mr. CARLIN. Have you read the tentative bill No. 1 of the committee?

Mr. MINAHAN. I do not know that I have, unless it is the bill that I just now referred to—12123.

Mr. CARLIN. No; that is the Stanley bill. You read section 9 of the tentative bill No. 1, and I think you will find it covers what you are after.

Mr. DYER. What section?

Mr. CARLIN. Section 9 of No. 1.

Mr. VOLSTEAD. That is the first section of that bill.

Mr. MINAHAN. I will not take your time to read it now. If that be the fact, then, of course, that would not be any criticism on Stanley bill 12121, but, as I say, I had read that other bill before I came to Washington, but this tentative bill I had not read at all, and it was only suggested to me, that possibly there was a bill covering that proposition, but I want to keep that entirely clear before the committee, so it will not be assumed, at least, that the Stanley bill, 12121, covers that proposition. It can not cover it, on account of the fact that there are two distinct things there to be kept in mind.

Mr. FLOYD. Now let me ask you a question in that connection: As I understand you, you are not criticizing the Stanley bill insofar as it prevents the combination, but you think it ought also to include individual corporations doing the same thing?

Mr. MINAHAN. Exactly. I think that it ought to go a little bit further; that the descrimination ought not to be limited only to those who have entered into a contract or combination in restraint of trade; that is, the prohibition of discrimination by such persons. So that, if as is suggested, that identical proposition is included in section 9 of tentative bill No. 1, then if both bills become laws, of course my proposition would be enacted into law, but with the idea that possibly one might displace the other, I want to leave that idea with the committee.

Then, I want to suggest two reasons, very briefly, why there should be a Federal antidiscrimination law, lest it should be argued by somebody that the Federal act is not necessary, in view of the number of State acts. There is an antidiscrimination law in Wisconsin, and in Michigan, Minnesota, Iowa, and some of the other States near about us there, but we are finding now that in a State even, where competition is pretty strong, that the price all over the State is lowered, so that that competitor shall not become strong enough to spread over the State line and into another State. For instance, the price of gasoline in Michigan is 1 cent less all over the State of Michigan now to the consumer than it is in the State of Wisconsin. Then, there is one other practice that makes necessary absolutely a Federal statute.

Mr. CARLIN. A Federal statute would make it the same all over the country?

Mr. MINAHAN. The Federal statute would make it the same all over the country; yes.

The practice now that is bothering the independent oil dealer more than anything else, since the antidiscrimination law in the State was passed, is the practice of going to one of the independent's customers with a proposed contract that is a little bit under the local market, and if he takes that contract, making the contract subject to acceptance by an office of he concern outside of the State, so that the contract becomes an interstate contract; and then, although the goods are shipped from the local storehouse, yet is it so far an interstate transaction that it is impossible to reach it by the State law.

I want to pass on to a proposition that affects both bills or any bills that have been introduced. It is a question of the phraseology of the law, and that really explains my being here. I am attorney

for the Barkhausen Oil Co., an independent oil concern, with its principal office at Green Bay, Wis., and we have had a little practical experience with the working of the Wisconsin antidiscrimination law, which caused these associations to send us here to give to you what facts we have gleaned from that experience. It is an advantage, of course, and rather an unusual advantage to know in advance of framing a law what contentions may be made regarding the phraseology of it. I want to give you that—I want to give you a little bit of the history of what has happened under the Wisconsin law, and what I am saying now is directed to the phrase in the law, "cost of transportation." It would seem at the outset that that was very clear, and yet there are some very serious propositions that are going to arise under it.

The Standard Oil Co. sold gasoline at Green Bay, Wis., for 15 cents a gallon; it sold gasoline at Hurley, Wis., for 14.8 cents a gallon. Now, Hurley is considerably farther from Whiting, Ind.—the common point of production—than is Green Bay. As a matter of fact, it costs twice as much to transport it by rail to Hurley as it does to Green Bay. In exact figures, it costs $0.0066 a gallon more to take it to Hurley than it does to Green Bay.

Mr. CARLIN. If shipped in carloads?

Mr. MINAHAN. If shipped in carloads; yes. That is the way they ship—in tank cars. We figure if the price at Green Bay was properly 15 cents, that the price at Hurley ought to be 15.66 cents; or, as they run it to only three figures, 15.7 cents. The price at Hurley was, as I said, 14.8 cents, and we called the matter to their attention, and they declined to change it, so we filed a formal verified complaint with the attorney general, asking that the matter be investigated and that the corporation be ousted from the State for discriminating against us. We had an informal conference with them on that proposition before Attorney General Owen. It is now pending with the attorney general, and they explained the difference between the Hurley and Green Bay price by saying that the cost of local cartage in Hurley is less than the local cartage in Green Bay.

Mr. CARLIN. Local cartage.

Mr. MINAHAN. Local cartage from the distributing plant to the consumer. A Senator to whom I talked yesterday asked me if the attorney general did not laught at them. I told him that he did not; and after a little reflection one will see there was more show of reason behind that contention than one would at first think. They say that "cost of transportation" means actual transportation expense. We have contended all the time—and we find it has been in the mind of the legislators who passed these laws in the States—that that phrase means the freight charges, freight rates, from the point of production to the plant, and that it has nothing to do with local cartage any more than it has to do with the rent they pay for the plant or any othe rexpense they may have at the particular city. That is why we think the phraseology of any antidiscrimination statute that is passed, instead of being "cost of transportation" or "actual cost of transportation" should be "common-carriers' rates."

The South Dakota law provides for the equalizing of distance and the elimination of freight rates, so that there is precedent for that language in a statute. That is the statute that was declared constitutional by the Supreme Court of South Dakota, and the constitution-

ality affirmed by the Supreme Court of the United States a year ago, in 226 United States, 157.

Mr. FLOYD. What is the exact phraseology of the South Dakota statute?

Mr. MINAHAN. South Dakota?

Mr. FLOYD. Yes; on that particular point.

Mr. MINAHAN. I can give it to you.

Mr. CARLIN. What is the style of that case?

Mr. DANFORTH. Have you the name of the case?

Mr. MINAHAN. Yes; I have it. That is the one I gave a little while ago. State *v.* Central Lumber Co. (123 N. W., 504, South Dakota; 226 N. S., 157). The South Dakota law provides in the usual manner that a commodity in general use shall not be sold at a lower rate in one section than another:

After equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom.

Mr. CARLIN. They used the expression "freight rates"?

Mr. MINAHAN. "Freight rates."

Mr. CARLIN. That appears to me to be a better expression than "common carrier."

Mr. MINAHAN. Possibly, and still is not that exactly what you mean when you say "freight rates"?

Mr. CARLIN. They may deliver by local common carriers.

Mr. MINAHAN. That is important in a proposition I have, which rests on that identical point.

Mr. CARLIN. That was what was running in my mind.

Mr. VOLSTEAD. I will ask you whether that point was raised in the South Dakota case?

Mr. MINAHAN. No; the interpretation or construction of the language of those statutes had never been raised until it was raised, as I said, in our proceedings in Wisconsin.

Mr. VOLSTEAD. Might there not be some question as to the constitutionality of an act that would place an additional handicap, such as increased cost, for instance, of local distribution?

Mr. MINAHAN. It does not occur to me that that can be so. The constitutionality of those acts has uniformly been upheld by not only South Dakota and the United States Supreme Court, but by the Supreme Court of Iowa, by the Supreme Court of Nebraska, and by the Supreme Court of Minnesota, upon the ground that within the police power of the State is the power to prevent monopoly; and this legislation is all directed toward the prevention of monopoly upon the theory that the legislature may say to those persons, firms, or corporations who have been engaged in the practice of underselling at one point and recouping their loss at another, that "You shall sell for the same price all over this State."

There is one known commodity or price or item, is what I mean. That may yet be eliminated, so as to give all of the people of the State the price to which they, by reason of their location, may be entitled, a means of transportation that is open to all alike, to the big fellow and the little fellow, and that is the freight rate, because we have now transportation companies engaged in no other business than transportation, that are required to publish rates which are open to all alike, and which rates themselves are subject to some control with reference to the amount.

Mr. VOLSTEAD. Do you believe that we could pass a law that did not make any allowance for freight rates?

Mr. MINAHAN. I confess that that is a proposition that never occurred to me before, and those constitutional questions are questions on which one can not very well hazard a guess which would amount to anything.

Mr. CARLIN. I did not catch that question. What was it?

Mr. VOLSTEAD. Whether we could pass a law without reference to freight rates, fixing the price—that is, by the police power—that would extend that far.

Mr. MINAHAN. In that connection I will point out this much, with reference to that cartage charge: It would be conceded, I think, that we would interpret the law to mean that the local expenses of the plant are eliminated. That certainly has been passed on by these courts. They did not assume for a moment that the rental of the land upon which the plant stands, or anything of that sort, would form an independent element of the price. The idea of the legislation is that all of the overhead expense goes into the basic price to which the cost of transportation from the point of production may be added.

Mr. VOLSTEAD. It may be spread over the whole product?

Mr. MINAHAN. It may be spread over the whole product, and that we have got to do in order to prevent this practice. In other words—I speak of the Standard Oil Co. because I represent the oil men, and when we think of the other fellow we think in terms of the Standard Oil Co.—suppose the Standard Oil Co. should say they want to put each plant on its own feet, and make this proposition: "Here is what we want to do: We want to send all this gasoline to Green Bay, Oshkosh, Fond du Lac, and these other little towns for a certain price, and then let each one of those plants sell it at whatever price they can sell at a profit." It would be right and just that we permit them to do that, if we were able to do it; but to attempt to do such a thing would throw us into such a mass of figures and computations that the administration of the law would be a fizzle. So that, in order to curb the practice, it has been necessary to say, "You shall sell all over the State, not for the same price, but for the same price, eliminating a known quantity—the cost of transportation"; but we want to say "freight rates."

Mr. WEBB. Can you think how it is and why it is that within a radius of a hundred miles of Washington two or three different prices for gasoline prevail and that we find different prices here in this city—some 17, some 19, some 20; and I think over in Richmond they sell it for 25 cents, but the Standard Oil Co. sell at 22 or 22½ cents? Have you any explanation for that?

Mr. MINAHAN. I do not know whether in the East you have a difference in grades which would account for that or not. That difference in price was mentioned to me yesterday or the day before. But we go up against those identical propositions, or did before our State antidiscrimination law went into effect; there was absolutely no uniformity of price whatever.

Mr. CARLIN. You believe in uniformity of price?

Mr. MINAHAN. I believe in the antidiscrimination law. I think that the antidiscrimination law is absolutely the only legislation

that can be passed so that the independent oil dealer and independent in other lines may call their souls their own.

Mr. MORGAN. Mr. Minahan, I think that in Oklahoma—the State which I represent, in part—they have a law which throws the oil-distributing companies under the corporation commission, and recently the commission made an order fixing the prices at which the oil should be sold in the various sections and parts of the State, which applied to all companies. What would you think about that as a proposition to protect the people in fixing the price of oil?

Mr. MINAHAN. Right offhand I would think that would be a little bit more than is necessary. We never want to get any legislation designed solely to protect the independent oil men. All this legislation is designed to protect him merely for the purpose of benefiting the community at large, not to fix the price at which he will be able to do business. The one object of the antidiscrimination law is aimed at the evil practice of destroying a competitor by underselling at one place and recouping the loss at another.

Mr. MORGAN. You represent independent companies?

Mr. MINAHAN. Yes.

Mr. MORGAN. I suppose you assume there is no danger in the independent companies and that all the danger is in the big companies?

Mr. MINAHAN. Sometimes we assume that; it is not necessarily so, of course.

Mr. MORGAN. In our State, as I understand it, the bulk of the business is done by the independent companies, but these independent companies were selling at different prices and in various ways and it became necessary that the State should actually fix the prices, and within the last six weeks the corporation commission assumed jurisdiction and the companies did not resist it; they agreed to the order.

Mr. MINAHAN. I am not sufficiently familiar with legislation for fixing prices of service or commodities or public utilities to give an opinion, but I should imagine that would be a lot harder proposition to work out than the antidiscrimination law, and what I should say now is really directed at a different evil.

Mr. MORGAN. Your object looks more directly to the protection of the independent companies than the consumer?

Mr. MINAHAN. We are inclined to do that, all of us, but I know that it would be folly for me to come before this committee or any other body and ask for protection for the independent oil dealer; so that I come here with a proposition which, I say, is proper for the protection of the public, and I am advancing that, of course, as the attorney for the independent oil dealers. But I would not advance a proposition unless I was satisfied that it was directed toward the welfare of the people themselves. Any other proposition that we might advance would be temporary and foolish.

Mr. MORGAN. Let me ask one more question. Do those independent companies fix prices according to what would give them a reasonable profit, or do they, as a rule, sell simply under the prices fixed by the Standard Oil Co.?

Mr. MINAHAN. Oh, they just trail the Standard.

Mr. MORGAN. That is a fact, is it not?

Mr. MINAHAN. That is the fact.

Mr. MORGAN. That the Standard fixes the price?

Mr. MINAHAN. There is no question about it.

Mr. MORGAN. And the independent companies are compelled, practically, in order to do business, to follow along their trail?

Mr. MINAHAN. So much so that they often have to sell without a profit, and when oil goes up so that they can get a profit they are glad to sell for the extra tenth.

Mr. MORGAN. Then do you think, for the protection of the public, it might be wise as to those great concerns for the public, through the Government, to exercise some control over the price, in order that the price-fixing monopoly of the large concerns would not be unreasonable?

Mr. MINAHAN. Well, I presume if such a thing is feasible that that is almost Utopia. If we could do that with all of our industries and all of our concerns, guaranteeing our people the commodities in general use and all the necessities of life at a reasonable price—if such a thing were possible by legislation, short of Socialism, or even Socialism—that is what ought to be done.

Mr. MORGAN. If we should place simply those large concerns under some restrictions as to price and leave the great mass of business to competition, would not that reach all the real danger that exists, and would it ever be necessary to go further?

Mr. MINAHAN. You refer to something I have noticed in the press about corporations doing $5,000,000 a year of business, or something of that sort?

Mr. MORGAN. Something along that line.

Mr. MINAHAN. I confess I have not given sufficient thought to that so that I could say anything that would be of any value to this committee.

The CHAIRMAN. Have you read the tentative bill now before the committee, known as No. 1?

Mr. MINAHAN. No; Mr. Chairman, I have not. I regret that, too, because I wanted to be prepared to go into the subject with you fully, but I did not read it. I have not any excuse for it except——

The CHAIRMAN. This bill proposes to supplement the anti-Sherman trust law by adding section 9, in the following words:

SEC. 9. That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers, but this provision shall not authorize the owner or operator of any mine engaged in selling its product in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation who applies to purchase.

Mr. CARLIN. What do you think of that?

Mr. MINAHAN. I think that is subject to the same criticism in phraseology—in the phrase "cost of transportation."

Mr. CARLIN. I agree with you about that; but do you think that that latter provision there, which applies to the products of mines, would apply to the oil business—the last five lines—

but this provision shall not authorize the owner or operator of any mine engaged in selling its products in interstate or foreign commerce to refuse arbitrarily to sell the same to a responsible person, firm, or corporation, who applies to purchase.

Mr. MINAHAN. No; because the person from whom everybody buys petroleum products is a refiner, and he is not always connected with the person who takes it from wells. So, while oil wells might comes within the terms, to my mind it would not really make any difference, because the price fixing is done by the refiner. You see, the oil business is a little bit different from the mining business. While some of the oil companies own their own wells, and do take the crude from the wells and refine it, a great many refiners do not necessarily own their own wells, but buy the crude in the market, so that they are a separate institution really from the person or corporation that takes the oil from the oil wells.

Mr. CARLIN. Then if that were amended to meet your criticism in reference to freight rates it would have your approval, would it?

Mr. MINAHAN. With one further suggestion. I noticed, I think, in reading it, the Wisconsin law says, "A competitor, or one who in good faith intends to become a competitor."

For instance, the Barkhausen Oil Co. put a plant at Ironwood, Mich., which is right across the river from Hurley, Wis. They are practically one city, except the river and the State line divides them. The price there dropped some cents before the plant was erected. Under such a law the dropping of that price to keep out a competitor who had manifested an intent of going in there would be as much an offense as though it were done to one who was already in there, but under this law——

Mr. CARLIN. In that one particular business, under that act—you have that in mind?

Mr. MINAHAN. The Wisconsin act?

Mr. CARLIN. Yes.

Mr. MINAHAN. Oh, no; the Wisconsin act includes not only selling but buying and selling, and is aimed at the buyers of milk, butter, butter fat, poultry, and the like. So that you are not only prohibited in Wisconsin from selling a commodity in a general use lower in a community than another, but likewise from buying a commodity in general use lower in one community than in another.

If I am not taking too much of your time I wanted to go a little bit further into that question of the cost of transportation and that cartage item, because that may become a more serious proposition as your deliberations go on than you may anticipate now.

Here is the thing in the oil business that makes that pretty important: They have a central distributing plant, a big tank, that they fill up in these little towns along the railroad, and then they have a tank wagon, and they draw from the oil tank into the wagon, and they distribute it out around the town, and not only do that around the town, but out to the little towns in the country. If we are right in our contention that they can not include as an independent element of their price anything but freight rates, that requires them to sell

at the same price at those little towns out 5 or 6 miles as it does in the city where their plant is. And that will illustrate to you the reason that is back of their contention that they ought to be permitted to impose a cartage charge. And at first it occurs to one that it is entirely proper that they should do that. The thing that we do not like about this cartage charge is that in the nature of things it is likely to be elastic.

Mr. CARLIN. Under their own control entirely?

Mr. MINAHAN. That is it; it can be expanded or contracted to meet competitive conditions. While I am not going into that argument fully—we are arguing it quite fully before the Attorney General—I wanted to suggest it to you, so that if the argument were made that it will be understood it is not unanswerable; because it is entirely proper, when you analize it to the end, that this cartage should be included in the general basic price. While we would keep away from unnecessary interference with business, yet in order to prevent the practice it becomes necessary sometimes to go a little bit farther than we had originally intended. The result would be to require them to carry that item in their general overhead charge.

Mr. CARLIN. Let me ask you this question: Suppose that we confine it to carriers and do not allow anything on the cost of the product, that might in the last analysis compel them to sell that product to the independent distributers, who could, being entirely intrastate dealers, deliver the product plus the cartage—indeed, they would have to deliver it plus the cartage.

Mr. MINAHAN. In order to live.

Mr. CARLIN. In order to live, and would not that be the result?

Mr. MINAHAN. Not necessarily so; it may be claimed that that might result.

Mr. CARLIN. Would not that be true of your own company, that you would have to do that, unless you could add the cartage to the price of your oil, and you would have to go out of the cartage business and leave that to some independent person, who could add the cartage charge?

Mr. MINAHAN. No; not any more than the local grocery man does. If you go to a grocery store and buy a dozen bananas for 10 cents and take them in your hand and walk away with them, you are not getting them any cheaper than if you should walk into the grocery man's store and order a dozen bananas and have them sent 4 miles out to your home. The grocery man performs that extra service as a part of his overhead expense and as a part of his means of getting business, and the independent oil dealers—I can not speak for all of them; I know about the business of the Barkhausen Oil Co.—it follows the price that it finds, that the Standard Oil Co. has fixed, of course.

Mr. CARLIN. You follow the Standard Oil Co.'s price, do you not?

Mr. MINAHAN. We have to as a matter of fact.

Mr. CARLIN. The trust always fixes the price at a certain figure, plus the freight rates?

Mr. MINAHAN. It is not always plus the freight rates. For instance, the city of Shawano has a 12½-cent rate from Whiting. The city of Green Bay is on a 10-cent rate from Whiting. That would

make a difference of pretty nearly 0.2 cent a gallon. If the price of gasoline in Green Bay is 15 cents you would expect to find the price in Shawano at 15.2 cents. The Standard Oil Co. have a plant at Shawano. They sell gasoline there for 15.1 cents, and they load it on a tank wagon and drag it over the country for a distance of 22 miles to Green Valley, Wis., and sell it there at 15.1 cents. Sometimes they do, and sometimes they do not charge cartage.

Mr. CARLIN. Why should they do that now when they really are the price fixers—they lead and you follow?

Mr. MINAHAN. They do that because they want to get it down to where is does not even pay to follow. We are not in business at Green Valley, but a concern we know of that is in business near Green Valley—7 or 8 miles—went over there and took a tank wagon to Green Valley, and finding the price 15.1 cents turned around and hauled it back 7 or 8 miles, thinking they could better afford to do that and sell it at the place they were then located at, several miles away, than sell it in Green Valley at 15.1 cents. That may be the reason it went to 15.1 cents. They do that elsewhere. We have received letters from independent oil men in which they say that where previously the cartage charge was a quarter, and a half, and three-quarters of a cent higher, when they sent it out into the country where they have competition there is no cartage charge; and a man who wrote me is a man who was previously in the employ of the Standard Oil Co., and he knew whereof he spoke.

Mr. CARLIN. Your idea is that nothing should be allowed for cartage, but that it ought to be charged into the overhead expenses?

Mr. MINAHAN. That is it exactly. In order to accomplish the end of the law, I think it necessary to do that. But it is the result of that construction was a wrong so great, in the minds of the average man, that it would be sufficient reason for not passing such a law—if that item of cartage were deemed important enough, it could, I think, be taken care of by a proviso in the law.

I do not want to go bond for this phraseology, because I have not thought this proposition over long enough so that I know whether it would hold water or not, but it occurred to me that if that cartage item is so woefully important (we do not think that it is; we think that its importance is artificial, and created for the purpose of making it hard to get these laws through and correctly interpreted when they are through), but if it is important, then we can add a proviso to that law like this: Provided that if any person, firm, or corporation engage in the sale and distribution of a commodity in general use shall file with some governmental body or officer, which shall be designated to receive such report, a schedule of cartage charges, based upon zones, which shall have a designated radius from the point of distribution; and if such a person, firm, or corporation shall uniformly charge such cartage price within such zones, then, in addition to the foregoing allowances, of grade, quality, and common carrier rates, there shall be a further allowance of such cartage. In other words, if it is so wonderfully important, let us make a special provision for it just as we do for freight rates.

Mr. CARLIN. I do not know the items that enter into the cost of oil, but it has always occurred to me that cartage in the rural sections must of necessity be quite an item, where you have to employ a

man and two horses, and provide those animals with feed and the man with his pay.

Mr. MINAHAN. As a matter of practical fact, I think that the oil men find that a great many of their country hauls are cheaper than their city deliveries, and that is for this reason—how much does a tank wagon hold?

Mr. HASTINGS, Jr. From 400 to 600 gallons.

Mr. MINAHAN. Mr. Hastings tells me that a man can load up a tank wagon in the morning with 400 or 600 gallons and go out 7 or 8 miles and deliver that to one or two customers out there, all of it, and return and probably be back to the plant before the fellow in the city, who has loaded up his tank wagon with 400 or 600 gallons of oil, has peddled his load in smaller amounts around the town; and that is because the country dealer has quite uniformly put in little underground storage tanks of 200, 300, 400, or 500 gallons capacity. So that they find, as a matter of practical fact, that it does not cost them any more to deliver out in the country, and that a man may go out with his 400 or 600 gallons and get back and have his money in the same time that a fellow can do it in the city. That is not always the case, but it is on the average. So, it is not a matter of such great importance; if it were, then it would be charged all of the time.

For instance, when the Standard Oil Co. said to us at Madison that the difference between the Hurley and Green Bay price was the difference in cartage, we asked them some questions. Before that they said to us, "We found there was a little mistake at Hurley, and we have raised the price a half a cent." Raising it half a cent would still leave it 0.36 cent under what we claimed it ought to be under that law. So we said to them, "Do you mean to say that the cost of cartage accounts for that 0.36 cent that you are still low at Hurley?" And they said "Yes;" and we said, "Do you mean to tell us that it costs you, by actual computation, figured to four decimals, 0.36 of a cent a gallon less to deliver gasoline and kerosene at Hurley than it does in Green Bay?" And they said, "We do;" and we said, "Do you always figure your cost of cartage as closely as that?" And they said, "Always;" and we said, "Do you always include it in the price as an independent item?" And they said, "We do." Then we said, "The price of gasoline in Green Bay, Hilbert, Berlin, Fond du Lac, Oshkosh, Two Rivers, Manitowoc—towns within a radius of 50 or 75 miles; towns of 30,000 or 40,000 and towns of maybe 1,500—all on a 10-cent rate from Whiting, Ind., the price in all of those places is 15 cents; do you want us to understand that you claim that the cost of cartage, by actual computation to the fourth decimal, is identically the same in all of those towns?" And they said, "Yes; why, yes." We told them very frankly that it did not look reasonable to us.

Mr. CARLIN. It must be different as to coal, where, for instance, the cartage would seem to me to be quite an item.

Mr. MINAHAN. You mean that this cartage proposition, as applied to the coal business, would be, if not important in the oil business, more important in the coal business?

Mr. CARLIN. Yes. We are speaking now with reference to the adoption, of course, of a general rule.

Mr. MINAHAN. That is the problem. We see the thing from our particular angle, but we do not always think of it as it affects every-

body else. I do not know enough about the coal business to speak with authority. Of course, there is really only one business that is handled the way the oil business is handled, and that is just the oil business. As the Supreme Court, in one of those cases that I mentioned in Iowa, Minnesota, or South Dakota, said, it is unique that there is not any other business which is handled in just the same way. Now, in the coal business, for instance, the little local coal dealer that does the delivering, he never mines it, and I do not know just exactly the way he does do business; but it is not done from a central distributing plant in exactly the same way that the oil business is carried on. Of course, he has his coal yard, but very frequently those fellows buy from a larger dealer right in the same town. They do not deal with the jobber or the miner.

Mr. MORGAN. Mr. Minahan, fundamentally why should not a man have a right to make his price according to the cost of transportation plus the cost of cartage? Would not that be fair?

Mr. MINAHAN. It would; I said that; and it would be fair to go further and say to him, "Here, if it costs you $500 a month for ground rent in this town and only $200 ground rent in that town, that town ought to get the benefit of it"; but, as I have said, that item has got to go overhead, because it is not a fixed charge like common-carrier rates. There are some things we have got to put into overhead expense.

Mr. MORGAN. Why have you got to?

Mr. MINAHAN. We have got to make a workable law—make a law that can be administered—one that will accomplish the destruction of the evil it is aimed at. We do not want to interfere with business any more than we have to.

Mr. MORGAN. We are striking at unfair competition, where one concern is destroying another with unfair competition?

Mr. MINAHAN. Yes.

Mr. MORGAN. Have we not got to take into consideration the expense of running the business at a given city? It certainly would not smack in any way of unfair competition to take into consideration the rent a man pays and cartage and the other conditions at that city?

Mr. MINAHAN. No; if you can do that and limit and define it positively so that it can not be made a charge which can be contracted and expanded to meet competition, we are perfectly willing it should be done; but what we want to keep away from are the items that are elastic.

Mr. MORGAN. Suppose one merchant pays $50 a month, and another pays $100, or one merchant owns his establishment and his real property and business house, and another does not. The law does not take notice of those things, but lets each man sell as cheaply as he can according to the conditions.

Mr. MINAHAN. Yes: I think it is perfectly right, and we do not want to interfere with that proposition any more than we have to; but if in order to prevent what we know to be abuses, we have to encroach upon their desired method of doing business, why, that is a result directly of legislation, but the legislation is the necessary and direct result of their evil practices.

Mr. MORGAN. Let me ask you another question. I noticed awhile ago, when you gave offhand the form of the law that you would

enact, you said: "Provided any person, firm, or corporation engaged in the sale or distribution of articles in common use." Was that done intentionally?

Mr. MINAHAN. I have fallen into that because most of the State statutes are framed in that manner.

Mr. MORGAN. You will observe, I think, that these laws we have tentatively here do not use any expression like that. It includes all the kinds and characters of business, articles, and products, but does not tend to limit its application. Have you thought of that matter? Do you think it would be wise, in as much as the prevention of monopoly is the protection of the people against general abuses—to put that kind of a phrase in the statute we pass?

Mr. MINAHAN. I would say, offhand, probably not; that it might precipitate you sometimes in the administering of a law into a pretty serious question as to whether or not a commodity was within legal definition a commodity in general use. I presume there might be some trouble with that phrase.

Mr. CARLIN. You probably have heard a great number of people say they want the Government to fix the price of products—want to take that privilege away from you and have the Federal Government fix the price. You would not favor that, would you?

Mr. MINAHAN. I do not know what I ought to say as attorney for the independent oil men. I don't know what their interests demand. Apart from my duty to my client to examine things in that light, I should say that my inclination would be against such a thing as that.

Mr. MORGAN. May I ask one question? You said here repeatedly that the Standard Oil Co. fixes the prices and that you follow in their trail. Do you not think it would be about as fair for the Government to fix the price as that the Standard Oil Co. should fix it?

Mr. MINAHAN. It would be a whole lot fairer; there is no question about that.

Mr. MORGAN. Then, why not do it?

Mr. MINAHAN. I do not know whether that would be the proper remedy or not, whether we ought to say that somebody has got to control it and let the Government do it, or whether we ought to let it go back into the competitive channels again; and if that can be done, perhaps that course would be better; I think monopoly can be prevented by taking away the weapons of monopoly.

Mr. MORGAN. Suppose a trade commission had jurisdiction over the Standard Oil Co. and big concerns, and that that commission could fix the price, but would have no jurisdiction over smaller concerns, because they are not monopolies; do you not think it practicable for the Government to supervise the prices of those few big concerns?

Mr. MINAHAN. That is really too big a proposition for me to get hold of. I have not thought of and I have not considered the advisability of the trade commission or of the Government fixing the prices.

There is one more matter I want to draw your attention to, connected with our friend "costs of cartage." I will say that the cartage alone is not of such great importance to us, because, although they can squeeze from 0.3 to 0.5 of a cent out of us sometimes on cartage, they can do a lot worse to us, perhaps, than that. While they might on the cartage squeeze us, we might perhaps have a fair opportunity of making them show us the figures, as they have under-

taken to do now in Wisconsin, although they were asked on the 2d of January, and they have not been able to show it yet, but they say that this phrase, "cost of transportation," means actual transportation expenses, and that is one thing that interested us when we saw this word "actual" in the bills that I refer to. If there is any question about the phrase "cost of transportation," whether or not that means "actual transportation expense," it seems to me that putting the word "actual" before "cost of transportation" rather helps their interpretation than ours, so that, at any rate, I think the word "actual" ought to be omitted.

Mr. FLOYD. How would you differentiate between cost of transportation and actual cost of transportation?

Mr. MINAHAN. I do not think that it can be differentiated. But the fellow who says to you it means "actual transportation expense" will say to you, "Why, cost of transportation, you know what that means. There was no necessity for putting the word *actual* in there, unless it meant *actual expense*." Do you not see?

Mr. FLOYD. Would that include cartage?

Mr. MINAHAN. Yes; that would include cartage and everything else. They would say, "If it was not necessary to include 'actual,' what was the sense of putting 'actual' in there?" That would be their argument.

We are in a port town—Green Bay. The Standard Oil Co. there has two large distributing tanks of a million and a half gallons capacity each. The Standard Oil Co. is big enough to own tank steamers, and they bring their kerosene and gasoline to Green Bay in a tank steamer. They run that tank steamer up to their big tank of a million and a half capacity and just shoot it full of gasoline or kerosene. The Standard Oil Co. owns these tank steamers. The Standard Oil Co. is not by tank steamer a common carrier of kerosene and gasoline. There is no common-carrier tank steamer on Lake Michigan.

Now, then, they say to us, "If we can not make this cartage charge, why, we will have to take that out of our price, and that will cut your market; and if we can make the cartage charge, then we will have to make the price on the basis of actual transportation. That means we will have to put in a price based on actual transportation expense; that means we will have to base our price at Green Bay not on rail rates but boat rates; and since the boat rates are about one-tenth of the rail rates, we will have to take the bottom out of your market in Green Bay in that way," leaving us the privilege of dropping the proceeding and crawling out of the first hole handy, because, if we were right in our interpretation, they would drop the bottom out of the market in Green Bay; and if we were wrong, they would cut the heart out of us with boat transportation prices.

Now, the question is whether there will be permitted——

Mr. MORGAN. Just there, when you want to put in "common carriers," you want to make it so that the Standard Oil Co. will not apply the cost of transportation to the cheap cost which they have in transportation in their own steamers, but must add to it the cost of railroad transportation?

Mr. MINAHAN. That they shall sell at the same price in Green Bay as in the rest of the State, eliminating common-carrier trans-

portation. That is a thing that is open to them and their competitors alike.

Mr. MORGAN. Would it not be better for the public to apply the proposition of actual cost of transportation and get the benefit of the cheapness of cost on this production; make the Standard sell and take into consideration the cheap cost of transportation?

Mr. MINAHAN. A benevolent despotism is regarded as the ideal form of government.

Mr. MORGAN. Then you think the main object of this is to make it operate to the benefit of the independents and keep them in business?

Mr. MINAHAN. Not at all. I am not so short-sighted as that. I will explain that proposition to you this way: It is a favorite argument of the monopolists, and I have heard it many a time before, that the people are entitled to the advantage of their location and they are entitled to all the economies that big business can give them, and all that sort of thing. There is no question about it, and the only trouble is that the people have not been able to get it. If the Standard Oil Co. could bring kerosene and gasoline to Green Bay and sell it there cheaper on account of boat transportation, if they did not go ahead and abuse their unlimited power, boosting the price when they do not have a competitor, we would not have a look-in on that proposition. But here is the idea: Just as soon as you recognize the right of the Standard Oil Co. to bring that in upon their exclusive lines of transportation you admit their right to obtain monopoly.

Mr. MORGAN. Mr. Minahan, in effect, do they not have a monopoly now? You say that prices are fixed by them, and it is simply a monopoly, only they give you the privilege of distributing these goods and taking part of the profits out of the monopoly.

Mr. MINAHAN. Exactly; we say that they have a monopoly, but we are going to take out one of their fangs, so they will not sting the people; there is the idea.

Mr. MORGAN. Will they not still have the fixing of prices?

Mr. MINAHAN. They will. I do not argue for a minute that the antidiscrimination law is a panacea for all of our ills against monopoly, but I say it is a very effective check on monopoly, because you take off one of its strong right arms.

Mr. CARLIN. Otherwise you could not do it?

Mr. MINAHAN. Exactly.

Mr. MORGAN. If prices are fixed by monopolies, how does that benefit the people?

Mr. MINAHAN. While it may be a monopolistic price and all that, although the old economists did not always want us to think so—there is a difference between actual and potential competition. They used to say that monopoly would not get its price above what was right, because of potential competition, the competition that would spring up, but they are not half as much afraid of potential competition as they are of the fellow who is actually there on the ground and alive; and if you can keep the independent alive and in the field you have a force for keeping the price down to somewhere near what is right, because those independents are there.

Mr. MORGAN. Take this proposition: Is it not a fact that under the present law, or even if your own suggestions here should be

enacted, that the Standard Oil Co. could drive every independent company out of business if they wanted to?

Mr. MINAHAN. They could not be making a profit in the State. I believe they would have to sell pretty low in order to drive the independents out, and still make a profit.

Mr. MORGAN. Would not their better facilities of transportation that you refer to, alone give them sufficient extra profit to drive you out of business?

Mr. MINAHAN. That is limited now to two ports in Wisconsin, with all of the lake front that Wisconsin has, and that is connected with the proposition I was going to make after the one I had entered upon. The Standard Oil Co. said, "Oh, the people of Green Bay are surely entitled to the advantage of their location," and we acknowledge the beauty of the sentiment, but there is the idea: Kewaunee is right across the peninsula from Green Bay, 33 miles, on Lake Michigan. The Standard Oil Co. has no competitor there. They have a little tank there by the railroad track, and they run in a tank car, and load it into that tank and use that tank as a distributing center. Why do they not stop their steamship there? If transportation is so much cheaper, why do they not stop their steamships there? They do not want to, because they use their transportation facilities more in the nature of a club. But just as soon as it might be established that this phrase "cost of transportation" means actual transportation expense, and that they not only might, but, under the law, would be compelled to put in a price based upon boat transportation, then what competitor will ever go into Kewaunee? If any competitor goes into Kewaunee, in goes another tank, and then the tank steamer will stop there and fill the tanks up; down goes the price to the tank steamer transportation basis, with which we might be able to compete and barely live, and he might not. The very fact that they can do that is going to keep a competitor out of Kewaunee. Nobody is foolhardy enough to go into Kewaunee, because they know just as soon as they do, in comes the tank steamer, and down goes the price, and competition is bound to run dry. That results in keeping competition out of Kewaunee.

Mr. CARLIN. Where does your company get its oil?

Mr. MINAHAN. From a great many different independent refiners, but rarely ever from the Standard Oil Co. itself. Of course, when we do buy it from the Standard, we buy it in tank cars directly from their refineries.

So, I say it is a beautiful sentiment that the people on the Lake should get the advantage of their location. They never will until a competitor comes in; and the reign of low prices will end with his funeral. When he is gone, if one of those tanks springs a leak, or they do not care to stop a tank steamer, or it happens to be too stormy, in would come the tank cars by rail, and then the price would go up to the rail price again. It would be simply leaving it in the power of the Standard Oil Co. to crush its competitor at will.

Mr. CARLIN. It has no competitors if it fixes its own prices.

Mr. MINAHAN. It has competitors, although it fixes its own price. It has fixed prices with reference to competition. For instance, here was the price of 15.1 cents at Green Valley. They have a monopoly; they fixed the prices at Green Valley. Why do they drop it to 15.1 cents? Their competitor was not underselling them; their competitor

was selling at their price, but they want the business, so the very existence of that competitor who is willing to take their business is reason enough for them to cut the price. When we went into Hurley and Ironwood, they sold 30,000 or 40,000 gallons a month. The first month we were there we sold 15,000 gallons. They can not afford to let us take half of their business, and that is why they dropped the price.

Mr. CARLIN. If they sold at the same price to the public, they would not be losing a great deal, if you bought that oil from the Standard Oil Co. They would just simply be shifting their customer.

Mr. MINAHAN. We buy the oil from the refiner; we would not buy from the local plant, but buy in tank cars from the refiner, and put it into our own plant and then compete, and that is only done in stress of circumstances when we need it. We ordinarily buy from the independent refiners. There are scores of those. I do not know exactly what the proportion of the output is, but I think there are scores of independent refiners from whom they customarily buy all of their products.

Mr. CARLIN. But if the average independent buys his product from the so-called competitor, there is really no competition—just simply a change of customers.

Mr. MINAHAN. I have not speculated on the possibilities of that, because it is a rare circumstance when it is done, I know. I do not know whether an independent could buy from the refinery of the Standard Oil Co. and still compete with it in the local trade or not. Of course, they could fix the price so a fellow could not do that.

Mr. CARLIN. Does not the Standard Oil Co., including the independent companies they sell to, control about 90 per cent of the refined oil?

Mr. MINAHAN. I really have not any idea.

Mr. HASTINGS, Jr. I could not give you the percentage; they might control that much of the crude, but they would not control 90 per cent of the refined products.

Mr. CARLIN. I thought that was the figure.

Mr. HASTINGS, Jr. That might be so based upon the crude production.

Mr. CARLIN. Not as producers but as refiners?

Mr. HASTINGS, Jr. The Standard Oil Co. make their money on the control of the crude oil and pipe lines.

Mr. MORGAN. They do not own any oil wells?

Mr. HASTINGS, Jr. Oh, yes; they do.

Mr. MORGAN. They do own the oil wells?

Mr. HASTINGS, Jr. Yes, sir; they own the biggest majority of wells in the country.

Mr. MORGAN. That is contrary to my idea. I thought that they were not so much the owner of wells as that they buy the oil from the owners of the wells. I thought they bought the crude oil.

Mr. HASTINGS, Jr. They do buy a great deal of crude oil. They control nearly all pipe lines, and the owners of wells have got to give it to them, because they can not go anywhere else. The oil has got to go in the pipe lines, and the owner of the well has got to turn it over for the amount of money they offer.

Mr. MORGAN. Take the situation in Oklahoma. The Standard does not own very many wells in that country, but the Standard buys their oil?

Mr. HASTINGS, Jr. Buys their oil; that is true to a large extent in Oklahoma and Kansas.

Mr. FLOYD. Right in that connection, Mr. Morgan, a gentleman who was in the oil business in your State told me this—I do not know whether it is correct or not—that when a man discovered a rich oil well in Oklahoma he could not sell a gallon of oil to the Standard until he incoporated his company or well, and that when he incorporated a company that he could not sell a gallon until he had made a perpetual contract with the Standard to give it the entire output, and then he said he could furnish it all the oil he could produce. Do you know whether that is the condition?

Mr. MORGAN. I do not.

Mr. FLOYD. A man engaged in the oil business told me that was a fact—that they made contracts then to take the entire output, but this corporation would own the well, and that the Standard would have the exclusive contract to take the entire output of the well.

Mr. MORGAN. I noticed in the Tulsa papers that there is a good deal of trouble about the price the Standard pays—that they fix the price.

Mr. CARLIN. Mr. Minahan, have you made all the suggestions you care to make to the committee?

Mr. MINAHAN. I have just one more point to discuss, and that is the consideration of the freight proposition or cost of transportation. It is important that it be kept in mind that it seems to be the present-day theory that one of the things we have got to do to unharness ourselves from the hold of monopoly is to divorce industrial and transportation activities. And in connection with my argument on this boat-transportation proposition, I want that kept in mind, that that is an illustration of the importance of keeping the activities of industrialism and transportation separate. If the Standard Oil Co. is to engage in the buying and selling of petroleum products it can not be to our interest to permit it also to engage in the business of transporting such products by tank steamers; and the price must either be based on the common carrier transportation that is open to the competitor or else they must be compelled to become common carriers and carry it for us, too. I think that is all.

Mr. FLOYD. Do any of the independent refineries own pipe lines?

Mr. MINAHAN. I am not in a pipe-line district, and I really do not know very much, if anything, about it.

Mr. FLOYD. The Standard Oil Co., I understand, has a pipe line from Oklahoma to New York City.

Mr. HASTINGS (of Green Bay, Wis., who was with Mr. Minahan). It goes to Bayonne, N. J.

Mr. FLOYD. They own that pipe line?

Mr. HASTINGS. Yes.

Mr. MORGAN. The pipe lines are common carriers.

Mr. FLOYD. The cost would be very different by transporting it through pipe lines and transporting it by the ordinary common carrier, such as the railroads, or even boat lines. It would be a much cheaper means of transportation and one which would give them an advantage in transportation; and, construing the statute as you

do, they would still have that advantage, although it might be an unfair advantage.

Mr. MINAHAN. It is not an unfair advantage so long as they are charging only the common carrier transportation that is open to competitors. We object to the phrase "cost of transportation." We insist that instead of the words "actual cost of transportation" there should be the phrase, in any antidiscrimination law, "common carrier rates" or "common carrier transportation rates." And if it were thought that such a phrase would exclude a cartage allowance in a business where cartage should not be excluded, then a proviso could be put in which would provide for a further allowance for cartage, provided it be based upon a schedule previously filed. If you do not do that, if it is to be left elastic, then it would not be any good at all; but it would not hurt anybody if they scheduled a uniform cartage charge and adhered to that.

Mr. VOLSTEAD. How do you establish that a rate is fixed with the intention of destroying a competitor?

Mr. MINAHAN. How do I connect those two?

Mr. VOLSTEAD. How do you establish it?

Mr. MINAHAN. Well, we have not reached the point yet in our proceeding where we have got to establish it. In our case in Wisconsin, we have in mind that we will prove that the price was higher before we went in there. We can prove that. We can prove that they knew we were coming in there when they lowered the price, and we can prove that the price now is lower than it ought to be, and proving those facts, I think their intent in lowering the price can properly be inferred. Of course, the intent in everything must be proven by circumstances and facts. You never can put a witness on the stand to say what the intent was unless you should happen to get them in an admission.

Mr. VOLSTEAD. I presume it would not be possible to prove it at all.

Mr. MINAHAN. No. I do not suppose you could put a witness on the stand and have him say they did it with one intent or with another intent.

Mr. CARLIN. It seems to me that if you were to succeed in eliminating the cost of cartage you would be at a greater disadvantage than you are.

Mr. MINAHAN. I do not think so.

Mr. CARLIN. Because of the very suggestion you made a few moments ago, that if cartage is not to be included in the price to the consumer, then necessarily it would be excluded.

Mr. MINAHAN. Not at all.

Mr. CARLIN. And that would bring the price lower still and compel you to sell at a lower price, unless we had some method by which we could compel it as an overhead charge, and I doubt whether we could compel that. But if we eliminate it, which we probably have the right to do, it would enable them to exclude it from the price to the consumer. You understand, I am taking it from your standpoint.

Mr. MINAHAN. I understand the angle from which you are asking me to look at it, but notwithstanding that, the idea is that they are going to sell their product at a price that brings them a profit, and when they do so we can likewise be in business and make a profit. They can lower the price at any time they wish; they can

cut their price in two on any theory; and so, if we take the cost of cartage out of their price as an independent element, it will simply go back into one of the other elements, because, you know, there are in fact two elements in the retail price. We will take this proposition:

Let us suppose that the Standard Oil Co. does business all over the State of Wisconsin and has competitors all over the State of Wisconsin. If that were true this law would result in their having a flat base price for Wisconsin, and the price in any city would be the flat base price plus transportation from Whiting, Ind., to that city. It is our position that there would be those two elements in the price. They say there are those two elements, and also a third element. Now, if that third element should be eliminated as a distinct item of the retail price it will go back into the base price; it will surely be in there, but it will be in there as a part of one of the two elements of the price and not as an independent third element of it. Making it a distinct element is what gives it elasticity.

Mr. VOLSTEAD. How would this suggestion strike you: Suppose you put in a provision that if they did sell at less in different localities or to different individuals in the same locality that it would be prima facie evidence that they did intend to injure or destroy a competitor?

Mr. MINAHAN. Well, now, you are tackling me on a legal proposition which I am not able to handle.

Mr. VOLSTEAD. It seems to me it is going to be extremely difficult to prove the intention to injure or destroy a competitor.

Mr. MINAHAN. I do not think——

Mr. VOLSTEAD (interposing). They might be able to prove, on the contrary, that they did not intend to do so, but it might be well to put the burden on them instead of on the one attacking the practice.

Mr. MINAHAN. I see your proposition, and that may be entirely proper. But if these propositions are submitted to juries or the courts and they can not find an intent, where the reasonable inference from the facts is the intent, then we can not hope to get away and never can get away from monopoly. We never can get away from monopoly until our people are educated to get away from it; until the people understand that they have got to get away from monopoly. The people ought to be made to understand that proposition and that the responsibility is upon them. If you give the people a law whereby they can test monopoly for themselves and they do not do it, then the people can not rid themselves of monopoly. That is my theory.

The CHAIRMAN. We are very much obliged to you. Mr. Jones desires to be heard for 15 minutes.

STATEMENT OF MR. CHARLES H. JONES, OF BOSTON, MASS.

Mr. JONES. I am a shoe manfacturer. Since arriving here this morning I have hastily examined the bills that have been prepared by the chairman of this committee, as I understand it, and I will only take time to refer to those points that seem to affect or apply to the industry in which I am engaged—that is, the manufacture of shoes.

In section 10 of the first bill it is provided:

That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations, or a part thereof, for any person in interstate or foreign commerce to make a sale of goods, wares, or merchandise, or fix a price charged therefor, or discount from or rebate upon such price, on the condition or understanding that the purchaser thereof shall not deal in the goods, wares, or merchandise of a competitor or competitors of the seller.

In the business in which I am engaged the merchandise is not sold, but machinery is leased on condition that you shall not use other people's machinery. It would seem to me that if you so desired it would be possible to cover that point in this section. The machinery we use is leased to us and the price is made dependent on the fact that we use only machinery of a certain company. Now, I do not think that would come under this section as now written.

Mr. FLOYD. They do not sell, but they lease?

Mr. JONES. They lease the right to use the machinery.

Mr. FLOYD. They lease the shoe machinery on the sole condition that they are not to handle any——

Mr. JONES (interposing). That you will not use any other person's machinery in connection with it.

Mr. MORGAN. That is patented machinery, I suppose?

Mr. JONES. Some is and some is not, sir. They tie it all together, patented machinery and unpatented machinery.

It seems to me that section 12 of this bill is of extreme importance to our business. That is the section that provides that whenever in any suit or proceeding, civil or criminal, brought on behalf of the Government, a final judgment or decree is rendered against any corporation to the effect that any corporation has entered into a contract, combination in form of trust or otherwise, or conspiracy in restraint of trade, that a private individual can use that evidence up to a certain point. I understand that some people have declared that section to be unconstitutional, but I know that some very good lawyers say it is perfectly constitutional. But we consider it of the utmost importance. The big corporations with which we deal are not especially afraid of the Government in a great many cases, because the Government's procedure is very slow, it is very cumbersome, and before the Government can actually get into operation, to save themselves they can change their method and accomplish something else, but they are afraid of the man they are wronging. If a man is a real sufferer from the acts of the corporation and has the right to proceed against the corporation they will take notice of that. Under this act it is possible to use information that the Government has obtained, information which an individual could not possibly obtain for himself; that is, an individual can not summon witnesses and obtain information that the Government gets in all these suits. If Government information and evidence were available for the use of individuals, it would have a very strong deterrent effect upon the acts of a great many of these corporations.

I am not discussing these things as a lawyer, because I am not a lawyer, but as they strike me as a manufacturer.

Now, section 13 provides—

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief.

That, I understand, they do not have now; that every action that is brought against these trusts must be brought by the Government. The fact that under this bill an individual, firm, corporation, or association shall have the right to proceed strikes me as exceedingly useful and important.

Mr. CARLIN. Then you favor bill No. 1 as a whole? You think it is good legislation, do you?

Mr. JONES. Yes; I think it is first rate. It meets the conditions under which we are operating in a great measure.

Now, taking up bill No. 2, I will refer particularly to the third section, which provides:

To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

I think that section should provide for making, transporting, selling, leasing, or purchasing of merchandise, produce, or any commodity.

Mr. CARLIN. What bill is that?

Mr. JONES. It is No. 2, sir; and it is on the page that is numbered, at the bottom, with the roman numeral 10.

Mr. CARLIN. From what line are you reading?

Mr. JONES. Line 14, under the heading:

Third. To prevent competition in manufacturing, making, transporting, selling, or purchasing of merchandise, produce, or any commodity.

It would seem to me proper to put in there, "selling, leasing, or purchasing of merchandise," in order to make it a little more inclusive.

Mr. MITCHELL. Carrying out the idea suggested in your previous remarks?

Mr. JONES. Yes; it is the same suggestion. Whether it would apply or not, I do not know.

The next is No. 3, providing legislation regarding interlocking directorates. Interlocking directorates operate unfavorably in our business. We believe that directors of banks, of one bank or one trust company, should not be directors in another bank or another trust company. It happens that in our community one or two individuals are directors in a large number of enterprises, and if a merchant for any reason incurs the disfavor of a particular director it means that that director carries his prejudice against him in all the boards of which he happens to be a member, and it prevents a man's request for credit receiving favorable consideration. That is an experience I have had and seen on boards of which I have been a member and I know that occurs frequently. There are always pros and cons when a man asks for credit at a bank. Some of the directors will say the bank should favor his claim, while other directors will say that the bank should not extend the credit to him. Some director will cite the experience had with a man in another institution, and that often settles the matter, as far as the man's credit is concerned.

Mr. MCCOY. Is that true of trust companies as well as of banks?

Mr. JONES. I think so.

Mr. MCCOY. Do not the trust companies loan on collateral?

Mr. JONES. Yes; but they loan on paper, too.

Mr. MCCOY. On two-name paper?

Mr. JONES. On single-name paper; at least they do in our community. Of course, there may be nominal indorsements of a corporation, or something of that sort, but it is practically single-name paper.

Mr. WEBB. Trust companies are usually connected with some bank, are they not?

Mr. JONES. Not directly, but they are often closely affiliated, and I think they are very generally so affiliated in our community. It has worked out in a number of instances that a man has been denied credit because of hostility to him as a result of the fact that some man had something against him because of happenings in another board. That often times cuts out a man from obtaining the consideration he would otherwise obtain.

In Boston the consolidation of banks has gone to great lengths. One of our banks, the Shawmut Bank, is now composed of over 30 banking institutions which it has absorbed and consolidated, and others, although not to the same extent, have consolidated a great number of smaller institutions, so that a man's banking opportunities there are rather limited, as compared with the size of the community; that is, there are very few places where a large operator or a big merchant can go in the city of Boston and get credit unless he finds that the institutions are interlocked in some way, so that on account of any prejudice held against him for any reason, not necessarily on account of his financial condition, he is unable to obtain the necessary credit.

Mr. CARLIN. And he may be enabled to get credit that he is not entitled to for the same reason?

Mr. JONES. Certainly; and it frequently happens that some do get credit because of the friendship of one of these interlocking directors.

Then the only other observation I care to speak about in regard to these interlocking directorates is this: That where bankers are selling securities of a corporation it does not seem to me proper that they should be members of the board of directors of that corporation. I have seen that in our community, and under those circumstances they makes their own prices as buyers and sellers. It is certainly doing the corporation and the public an injustice in that direction. I think a banker that is handling the securities of a company ought to keep off its board of directors.

Now, the bill providing for the creation of a commission——

Mr. CARLIN (interposing). That bill is not before this committee.

Mr. JONES. I see.

Mr. CARLIN. The first three bills only.

Mr. JONES. Then I will not say anything in regard to that bill. However, there is one suggestion in regard to House bill 12106, a bill introduced by Mr. Levy, of New York.

Mr. CARLIN. That is a commission bill, is it not?

Mr. JONES. It says here, "Referred to the Committee on the Judiciary."

Mr. CARLIN. I understand, but does it not provide for a commission?

Mr. JONES. Yes.

The CHAIRMAN. Well, that is before the Interstate Commerce Committee, and I might say, with respect to bills providing for commissions, that I do not think this committee will consider them.

Mr. JONES. There is one clause in that bill which I think is very important. There is in this bill, which is marked as being referred to the Judiciary Committee——

The CHAIRMAN (interposing). There are several bills which have been referred to this committee relating to the creation of an interstate-trade commission, but the jurisdiction of that subject belongs to the Interstate Commerce Committee, and your remarks on that subject had better be made before the Interstate Commerce Committee of the House. I make that suggestion to you, although we are willing to sit here and hear you.

Mr. JONES. Well, I will not talk about those bills, then.

The CHAIRMAN. It would be of no avail, because the committee is not going to consider the matter of perfecting bills which relate to an interstate-trade commission and, therefore, any arguments along that line ought to be made elsewhere than here. Have I made myself plain?

Mr. JONES. Quite plain, sir. If those bills are not to be considered here I do not want to say anything about them.

Mr. MITCHELL. Did you not want to say something about the patent question?

Mr. JONES. Yes; it was the clause relating to patents that I wanted to discuss. It might be well to mention the matter so you can see my idea. It is in relation to section 21 of H. R. 12106, which is as follows:

That in case the owner or holder of any patent issued under the patent law has made use of the exclusive rights and privileges which, as such owner or holder, he controls, so as unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any article which may be a subject of trade or commerce, or so as to restrain or injure trade or commerce in relation to any such article, or unduly to prevent, limit, or lessen the manufacture or production of any article or unreasonably to enhance the price thereof, or unduly to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, storage, or supply of any article, such patent shall be liable to be revoked.

Now, that particular clause would prevent a practice that exists in our community at the present time and on which many of the monopolies rely for their protection. They say they have the right to attach any condition they wish to the use of the article which they have patented, and one of the conditions which they do attach is that you shall not use it except you use it in connection with some other things which they have but which are not patented. It seems to me that this is a very proper restraint. Now, we do not desire to limit in any way a man's right to use his patent, but we think the owners of patents should be forbidden to do what they are now doing generally, not only as regards our shoe machinery, but in other lines of business.

Mr. MITCHELL. Are there not a number of these companies that have combined their patents, and after they have combined say that they form a monopoly that is not in violation of law?

Mr. JONES. Yes. I heard it stated in court by counsel for one of these companies that all of the machinery which they had and which they were leasing was covered by patents, and that they had a right to tie them together in any way they saw fit. Then there are companies that have articles that are patented and articles that are not

patented, and they claim the right to use the unpatented articles in connection with the patented articles.

Mr. MITCHELL. As a matter of fact, have not a number of the patents terminated?

Mr. JONES. Yes; the patents on certain parts of the machinery do terminate, and then they supply other additions and changes which they claim give them a continuing patented situation. They claim these patents never expire. But if a man who is outside had the right to use the patents after they had actually expired, and if they were not tied up with existing patents, he could make machinery for himself and could use it without paying tribute for it. We claim the right to use an unpatented article; that is, an article on which the patent has expired. For instance, the McKay sewing machine, which was a patented machine and which brought its owners millions of dollars in royalties and revenue, could not be used until the patents expired, but when they did expire the machine became public and we did use it freely, without paying any royalty to anybody.

Mr. WEBB. Did not the Committee on Patents, about a year ago, report a bill of this sort?

Mr. JONES. I think so; but I have never heard of it since.

Mr. WEBB. It has been on the calendar ever since, and I think it met that very objection.

Mr. JONES. Yes; I remember the bill, but nothing seems to have been done with it. It struck me that perhaps something might be incorporated in the bills you have before you which might overcome that difficulty.

I thank you, gentlemen.

AFTER RECESS.

STATEMENT OF WILLIAM DRAPER LEWIS, ESQ., DEAN OF THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL.

Mr. LEWIS. I reside in Philadelphia and am dean of the law school of the University of Pennsylvania. Mr. Chairman, I shall confine my remarks to the three bills introduced by you, sir——

The CHAIRMAN (interposing). They have not been introduced.

Mr. LEWIS. Or, rather, the tentative bills, I should say; the three tentative bills before the committee. The object of the first of the three bills, as I understand it, is to prevent trusts and monopolies and unfair restraints of competition by interlocking directorates.

Mr. CARLIN. That is bill No. 3 in our volume of bills.

Mr. LEWIS. Yes. Now, I wish to say at the start that with that object I have entire sympathy. The first section of this bill, if I understand the object of that section, is to prevent unfair trade restraints or undue restraints, and also to prevent monopoly by interlocking directorates between public-service companies—railroads and other public-service companies—and the corporations which sell them supplies. Again, with that I have entire sympathy. If this first section merely said, in general language, that interlocking directorates between public-service corporations engaged in interstate commerce and the corporations or associations that sold supplies to

those corporations and prohibited them there would be no suggestion from me.

My difficulty with this first section is, in the first place, that it only prevents certain classes of interlocking directorates between corporations of a public-service nature and the corporations that sell them supplies. For instance, a person who is a member of a corporation engaged in the manufacture and sale of lubricating oil, which is bought by the railroads to a very large extent, would, as far as I can see, not be prohibited by this section from being a director of the corporation—public service or railroad company—in that case a railroad company—that bought supplies from the corporation of which he was a director. I think it should be so worded as to cover all of the classes of interlocking directorates which you wish to prevent.

The other objection to the section as drafted is this: That instead of preventing the evil in general language it attempts to specify exactly what kind of corporations shall not have interlocking directorates. It says, for instance:

> That from and after two years from the date of approval of this act no person, who is engaged as an individual, or as a member of a partnership, or as a director or other officer of a corporation in the business, in whole or in part, of manufacturing or selling railroad cars or locomotives, or railroad rails, or structural steel, or mining or selling coal, or the conduct of a bank or trust company, shall act as a director or other officer or employee of any railroad or other public-service corporation which conducts an interstate business.

Now, that would prevent, for instance, this: It would prevent a person who was a director of a coal company doing business on the Pacific coast exclusively from being a director, officer, or employee of a railroad in a part of the country which by no possibility would use the coal from that coal company of which he was a director, officer, or employee. It would——

Mr. CARLIN (interposing). Unless his influence was great enough to induce them to do so.

Mr. LEWIS. Unless his influence was great enough to induce them to do so, but there are some absurdities that even he, as a joint director in that case, could not do, to haul coal to Alabama, for instance, for the purpose of supplying a railroad there, that coal being taken out of mines thousands of miles away, and it would be distinctly "carrying coals to Newcastle." In other words, you are preventing by that exact language which you use a situation which, existing under the most extraordinary conditions, is not a situation which tends to produce monopoly or unfair restraints of trade in any way, shape, or form.

Take, for instance, a more likely illustration. You prevent a man who is a director of a structural steel manufacturing corporation from being a director of a public-service corporation. Now, I may be a director of a small corporation which owns one ferryboat which runs, we will say, across the Delaware River in interstate commerce. Therefore, by this language, you prevent me from being a director of a structural-steel corporation. Now, there is no possibility of any business dealings between those two companies. There is no possibility that that situation, which you there prevent, is ever going to do what I understand is the general object of this scheme and with which, as I say, I am in entire accord. But if I am a director of a

public-service corporation it practically does prevent competition between those who sell supplies to my company, if I am also a director of the company that is selling my company those supplies.

You are here preventing something where, by no possibility, my company, which is a structural-steel company, could sell to the corporation of which I wish to be, and of which the owners which me to be, a director. In attempting to designate the exact directorates that can not interlock or by defining the wrong, or by enumerating the ways in which you think the wrong may be committed, I think you are running into the danger of passing a statute which will prevent a large number of perfectly legitimate business transactions, and the point of view I have is that legislation designed to prevent monopoly and unfair restraints of trade ought not to do that unless it is absolutely necessary, which I do not think it is. There is no use of passing a statute which prevents thousands of business transactions which are perfectly legitimate, and a statute which unecessarily irritates the entire population by preventing acts which are perfectly innocent in themselves and very often beneficial in themselves.

Now, to further illustrate that same point, I call your attention to section 4. That section is intended to prevent interlocking directorates between corporations engaged in the same business, and, again, I think we will all admit that interlocking directorates between corporations engaged in the same business is very often a method by which monopoly is secured and where it is a means of obtaining monopoly. It should be prevented.

Now, with that perfectly laudable object back of this fourth section, it prevents interlocking directorates between corporations that are or have been "natural competitors." What do you mean by natural competitors? If you mean, as I assume those words must mean, that two corporations are, in a sense, natural competitors if they both sell their products in the same locality and they are engaged in the same kind of business, and you are attempting to prevent those two corporations from having a common directorate, I say that you are going far beyond what is necessary to hit the evil and that you are doing something that may prevent the very thing you are trying to help, which is competition. For instance, two corporations exist in one town; they both are engaged in the same manufacturing business; they both sell goods in the same general territory; they are competing with each other, but taken together they may represent but a fraction of that entire industry in that locality. There may be another big corporation in that locality in the same business. Now, you prevent the two corporations that are weak from practically running their business as one corporation through the means of similar directorates. Do you want to do that? It seems to me that it is not interlocking directorates which are per se the evil in all cases. It depends entirely upon the conditions whether interlocking directorates between corporations, even where they are engaged in the same business and have been competing with each other prior to the time of the interlocking directorates, are evil. It is a practical question, depending upon the particular facts of each case, as to whether that interlocking directorate is going to help competition or hurt it.

Mr. CARLIN. Your criticism of the first paragraph is that we have not gone quite far enough?

Mr. LEWIS. Yes, sir.

Mr. CARLIN. That we have limited the statute by specifying the different corporations; that we should have made it general to all corporations that sell supplies to railroads; and your last criticism is that in section 4 we have gone too far?

Mr. LEWIS. Yes; except that in both instances, it seems to me, you have committed the same vice, which is destructive of the efficiency of the legislation absolutely, and that vice is this: That it attempts to specify the ways in which the wrong which you want to prevent can be committed. By your first paragraph you——

Mr. CARLIN (interposing). Your idea is that we ought to permit cooperation between two small competitors as against one large competitor?

Mr. LEWIS. My proposition is, sir, that combination is one of the secrets of industrial efficiency; that your problem, and the problem of legislation, is to prevent it from being used, as it is often used, to attain monopoly; that the way to do that, so far as this interlocking-directorates bill is an example, is to state, in general language, that interlocking directorates for the purpose of unfairly restraining trade or attaining monopoly is prohibited, and then leave to some other body the right to ascertain whether in any particular cast it is being attained, with sufficient power to——

Mr. CARLIN (interposing). In other words, you would lodge such discretion in a trade commission?

Mr. LEWIS. Yes; I believe that should be left to the discretion of a trade commission and that it can not be answered in any other way.

Now, if I may refer to the other two bills, not entirely, but largely as illustrations of the same thought, of perfectly legitimate objects, which are in the minds of the draftsman of the bills, being carried out in a way which does not accomplish the objects which the draftsman had or apparently had in mind. I refer now to bill No. 1, a bill which is supplemental to the Sherman Act and which adds to that act sections 9, 10, 11, 12, and 13, and it is especially to section 9 that I desire to call attention. That bill attempts to prevent unfair trade practices which lead to monopoly, not by saying that unfair trade practices which lead to monopoly are wrongful, but by specifying two unfair trade practices which in the past have led to monopoly and which, I think, we will all admit should be prevented. Therefore, as far as it is a bill to prevent unfair trade practices, I wish to point out that it only deals with two of them and that it deals with them in the way of specifying exactly what the unfair trade practice is in most elaborate language. Instead, for instance, of the first section—which will become section 9, if passed, of the Sherman Act—merely saying that discriminations in price not due to cost of distribution are hereby prohibited, and then leaving it to a commission to apply to the individual cases, it starts out by saying:

> That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to discriminate in price between different purchasers of commodities in the same or different sections or communities, with the purpose or intent to thereby injure or destroy a competitor, either of such purchaser or of the seller.

Now, the criticism of that language is that it uses too many words. The words, when you come to define them, if you use too many of them, become loopholes for getting out of the wrong you are trying to prevent. The fact that you have to prove, for instance, "the purpose or intent to thereby injure or destroy a competitor" is an unnecessary addition. If you are discriminating in prices and the discrimination is not due to differences in cost of distribution then you should be stopped, because you are doing an unfair trade practice and it is an unfair trade practice that inevitably leads to monopoly. But the most dangerous part of this ninth section is contained in the provisos. The first proviso says:

That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of transportation.

Now, the word "quantity" there could be used as a loophole to make all kinds of discriminations. You do not really mean to permit any discrimination at all. I do not think that. The draftsman of the act surely must intend not to prevent differences in prices depending upon differences in cost of production or distribution. Is it not the purpose of this section to prevent discrimination in prices? Therefore, why in the proviso say that you can discriminate under any circumstances? If you need a proviso there, why not merely say, "That nothing herein contained shall prevent differences in prices due to cost of distribution," and stop there? I do not see any particular reason why they should be there. I think it would be better to leave out all of the provisos, because I can see no use in having them there.

The next proviso says:

That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in interstate or foreign commerce from selecting their own customers.

Well, there is nothing in this section 9 that prevents that, therefore, why say so? Why leave in your language a loophole by which people can evade and do the very thing you are trying to prevent?

But I wish to say, since I have criticized the first bill, and in a sense criticized bill No. 3 and also bill No. 1, that this bill is, because it uses more general language to describe the crime or thing to be prevented, especially section 10, unquestionably, from the point of view of my criticism, not nearly so much subject to that criticism as the other two. The vice of trying to define crime by enumerating the ways in which that crime can be committed, whether it is the crime of assault and battery, the crime of restraining trade or doing anything to monopolize—the vice of that is, I think, principally shown in this second bill, which, as I understand it, is an attempt to more particularly define the word "monopolize" and the words "restraint of trade" in the Sherman Antitrust Act. It says here in this first paragraph:

Any combination or agreement between corporations, firms, or persons, or any two or more of them engaged in trade or business carried on in the United States between the States or between any State or Territory and the District of Columbia, or between the District of Columbia and any Territory, or between any State, Territory, or the District of Columbia and our insular possessions, or with foreign countries for the following purposes.

The first purpose, for instance, as defined in this way is:

First. To create or carry out restrictions in trade or to acquire a monopoly in any interstate trade, business, or commerce.

Now, if all the manufacturers who produce a certain article should get together and fix prices they would undoubtedly be carrying out restrictions in trade, and they would be prevented by these very words from forming that combination. That is a good thing, but the Sherman Act already prevents that. Therefore, for any clarification of the Sherman Act, you do not want to use that exact language, because by using that exact language you also prevent this, which I do not think you want to prevent: Where any person, who does not represent one one-thousandth of the total production in an industry, sells out his business, and he makes the ordinary contract with the man who buys his business that that man will not again enter the business which he sells in competition with the man to whom he has sold that business; that he shall not sell his business and then turn around and compete with the man to whom he has sold. That is a perfectly legitimate business transaction. It does not tend to monopoly, except in cases where the sale involves the sale of the business of a corporation or person that represents complete control over the industry. That is monopoly, of course, at the start. But in that class of contracts, in 99 cases out of 100, you have a perfectly legitimate business transaction, and yet that transaction, as far as I can see, is specifically prohibited by this act.

Take, again, the second restriction:

To limit or reduce the production or increase the price of merchandise or of any commodity.

That such contracts, generally speaking, tend to monopolize and to unfairly restrain trade, we all will admit, but in so far as they do they are now prohibited by the Sherman Act, and by attempting to make the Sherman Act clearer, by defining more particularly the ways in which it can be done, you really have not prevented anything which the Sherman Act does not prevent. And furthermore, so far as I can see, in that section you prevent manufacturers from doing what a number of manufacturers in the city of Philadelphia did last year, or a little over a year ago. They got together and said, "We will not work our women more than 10 hours a day." That limited their production, and by this language you are preventing that. Do you want to prevent that? As far as I can see, that is what you are attempting in this bill.

But the most extraordinary section, the one that, to my mind, will produce the most extraordinary results, is the fourth section, which provides:

To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

Of course such agreements as that are often the basis of monopoly. That is admitted. But as here worded it does what the Sherman Act avoided, it prevents the formation of a partnership between two men who are in the same business, although their combined business may not represent one one-thousandth of the industry. Is not a part-

nership agreement between two persons an agreement between two persons to limit free competition and to obviate competition between themselves? Take, for instance, this situation: You have two corporations; they are engaged in the same business——

Mr. CARLIN (interposing). How would you remedy the evil you say we create there?

Mr. LEWIS. I should remedy it by the only way, as far as I can see, that it can be remedied.

Mr. CARLIN. By putting discretion in the hands of a commission?

Mr. LEWIS. Before that, let me state this: That the difficulty with the Sherman Act is not along the lines we are discussing; that is, whether it can be efficiently administered or not. The difficulty is that it leaves to a body—in the case of the Sherman Act a court—the right to take the rather indefinite words relating to the restraint of trade and monopoly and apply those words, as shown in the underlying principle that is expressed in them, to the concrete facts of each case as it arises; to mold the law, in other words, or mold its application so that new methods of doing an old wrong can be met. The vice of the Sherman Act is not that it specifies exactly the way in which restraints of trade can be carried out, but I think it will be admitted that this legislation, especially this second bill, proceeds upon the theory—and it is no fault of the draftsman, if I may say in the presence of the chairman, that he has drawn a bill which produces results under this exact language which I think he nor any member of the committee wishes to produce, restraints of certain kinds of partnerships; for instance, the consolidation of two corporations which are, in their consolidated form, not approaching a monopolistic position in that industry. But the vice is this attempt to define the crime, not by stating the underlying principle which makes the thing wrong but by specifically pointing out certain prominent ways in which often, but not necessarily always, that crime is committed. If you try to do that you complete, apparently, your catalogue of the ways in which the crime is going to be committed, but some ingenious person will always invent another way that you did not think of to commit the crime, and, furthermore, by the attempt of exactly pointing out you will prevent a lot of things which are not crimes at all.

Mr. CARLIN. To analyze your argument, I understand you to say that there are good combinations and bad combinations, and that in the last analysis there ought to be some discretionary power to determine that fact and then leave the Sherman law just as it is?

Mr. LEWIS. I would like to answer that in this way: That besides the difficulty of these acts trying to define a crime by pointing out the ways in which it may be committed, there is also this often more fundamental difficulty, that the whole attempt to settle the trust problem or monopoly problem is by legislation of this character. As I understand this legislation it is based on this general assumption, that the whole trust problem, the whole monopoly problem, can be solved if you can get at the different forms of combination and dissolve them. I do not believe you can, because I believe that back of monopoly there is something very much more than merely combination. I admit that monopoly practically always involves some kind of combination. You have got to have some kind of

corporation or unit of the business; you have got to have more than one person. It is conceivable that one person may attain monopoly, but that is not the practical conception. I admit you have got to have some form of combination; therefore I think it was entirely natural that the framers of the Sherman Antitrust Act should proceed upon the theory that if they could dissolve the combination it would end monopoly.

But the practical history of that act has shown that is not true; that when you dissolve the combination you leave something, and you leave something in the possession of those who combined and that they combine in another form, and that you have not ended your monopoly any more than the proceedings against the Standard Oil Co. and its dissolution has ended the situation of monopoly in the oil business. There is just as much to-day as there always was. Now, what is it that you left? You have left the basis on which the monopolistic power of that combination rested. In other words, those who combine to form a monopoly must have some basis on which to rest their monopolistic power. That monopolistic power depends sometimes on combinations alone, but very rarely. Sometimes it depends on the willingness to carry out unfair trade practices and the ability so to do; sometimes it depends upon an entirely different factor, the possession of an economic factor in the industry which is essential to production. I can illustrate that by a single example. Take, for instance, all the producers of a certain manufactured article combining to regulate prices, the illustration which I previously gave. Now, their combination is the secret of that monopoly. What you want to do is to break up that combination. Or you may have a large corporation and that corporation may have a monopoly because of its willingness to use its financial strength unfairly or to engage in unfair trade practices. Now, merely breaking up that corporation and leaving those persons who have been willing to do those unfair practices to combine in some other form and carry them out in another way does not end your monopoly. Again, your monopoly may depend upon some perfectly lawful and in itself innocent thing; it may depend upon the lawful acquisition of a patent, for instance, which is essential in the business.

Mr. CARLIN. I understand you to entertain the idea that because a rigid statute may affect some innocent parties there ought to be a discretionary power vested somewhere?

Mr. LEWIS. No, sir; that is not correct. The thought that I am trying to make clear is this: A corporation which, as a matter of fact, produces only 40 per cent of all the product of the industry may absolutely control the price of the product of that industry, although it only does produce 40 per cent. It may have, as far as the consumer is concerned, all the baleful effects of an absolute monopoly, just as though it produced every article that was produced in that industry, not because of unfair trade competition but because it may possess the economic factor essential in that industry. For instance, it may possess the natural resources, a monopoly of the natural resources on which the raw product of that industry depends; it may possess all the economic factors which enable it to absolutely dictate the prices in that industry. Now, the conception of those who drew the Sherman Act was, and the conception, as far as I can see it, under these bills still is, that you can remove that sort of business by dissolving

that corporation. You can not do it. You can dissolve the corporation; you can ruin the business organization which may in itself be a good thing; it is only producing 40 per cent of the industry and it may be an efficient business organization. The only way in which you can practically stop the monopoly is not by breaking up the combination but by ordering it to do that which will loosen its hold on the economic factor which gives it its monopolistic power—in one of my illustrations, for instance, the patent.

Mr. CARLIN. Would you do that by statute?

Mr. LEWIS. Yes.

Mr. CARLIN. How?

Mr. LEWIS. This will bring my rather lengthy remarks to a close. It seems to me you have got a problem that is entirely too difficult, as an administrative problem, to handle by the machinery of our courts; that the courts, crowded with other business, have neither the time nor the possibility of obtaining knowledge of industrial conditions sufficient to do the three administrative things that you have got to do if you are really going to prevent monopoly in this country, and these three things are: First, the investigation of whether a monopoly exists. The present machinery of the courts is not sufficient for that. That is admitted by practically everyone who has looked into the subject. Second, What is the basis on which the monopolistic power depends? Does it depend on unfair competition? Does it depend on the possession of economic factors, largely the control of transportation facilities, largely of patents, or largely of natural resources? The basis of such power must be ascertained. Now, if you have those two things answered, the body that has had the duty of finding out those two facts should also have the duty and right to issue a direct order prohibiting, in the case of unfair trade competition, the unfair trade. In the case, however, where the monopoly depends on the possession of natural resources, then it should direct the sale of those natural resources, with permission to others to obtain, at reasonable prices, the natural resources which are necessary to enable them to compete. If it is in the case of patents, for instance, it should have the same right; it should issue an order directing that the use of the patented article to the rival should be granted on reasonable terms, each order molded to the necessities of the case, but a direct order from the body that ascertained the facts. Now, those three——

Mr. CARLIN (interposing). Boiled down, does not that mean just what I asked you, that you want to have a commission created, a trade commission? That is what you have in your mind, is it not?

Mr. LEWIS. Yes, sir.

Mr. CARLIN. And that such a commission should have discretionary power to give immunity to those they think are conducting a good business and to prosecute those who are conducting a bad business?

Mr. LEWIS. No, sir; I can not——

Mr. CARLIN (interposing). Or, putting it the other way, to permit those things to be done which the commission thinks should be done and prohibit those things which the commission thinks should not be done?

Mr. LEWIS. No, sir; I say no to both those questions, and for this reason: We have no funds to give to a body of men—call them a commission or what you will—for the purpose of wandering around the

country ascertaining what is beneficial to be done—a sort of roving commission. I am just as much opposed to that as anyone could possibly be; and, therefore, if I answered yes to your inquiry, it might be that I should be held as advocating the creation of a commission with powers of that character. I believe that what you regard as wrong should be defined in a statute in the way that you define any other wrong—in more or less general language, it is true, but language which the courts or other bodies charged with the administration of that law could apply.

I believe that you should create a commission, but that you should not give that commission wandering powers; that you should give them power merely to administer the laws that you pass, and that the first law, for instance, should be an unfair trade-competition law; that you should give to that commission power to ascertain whether an unfair trade practice, as defined in the bill which you have passed, is being practiced, and that when they have ascertained that fact you should give them no discretionary power at all, except the duty or power of issuing an order prohibiting it.

Mr. CARLIN. In other words, you would take the Sherman law as the basis?

Mr. LEWIS. No.

Mr. CARLIN. Would you amend the Sherman law?

Mr. LEWIS. No; I would leave it as it is. I would leave the Sherman law as it is to be administered as it has been administered, but face the fact that the Sherman law has failed to solve the trust problem or the problem of monopoly, and then I would really try to solve that problem by passing legislation which would do it. The bills which I suggest, therefore, have nothing to do with the amendment of the Sherman antitrust law. They would, first, establish a commission, second, define what unfair trade competition is, and, third, I would give that commission this power, and only this power, to investigate on its own complaint, or on the complaint of anyone else, whether a monopoly existed. I would leave the Sherman Act to be administered as it is, but I would have this commission given the power to determine whether a monopoly existed, and if a monopoly existed the duty——

Mr. CARLIN (interposing). Does it not follow that they should have the power to say that one did not exist?

Mr. LEWIS. Yes.

Mr. CARLIN. Does not that mean immunity when one does not exist, in their judgment?

Mr. LEWIS. No; because you can give your Attorney General, or the other law officers, the power to bring prosecutions under any acts which you pass defining unfair trade competition.

Mr. CARLIN. I understand that; but I do not see how you can create a commission with powers to determine whether a monopoly exists unless it carries with it the power to determine when one does not exist.

Mr. LEWIS. As far as the action of that commission is concerned, yes; just as when you direct your Attorney General to bring prosecutions if he believes that an act has been violated or determines, in his opinion, that there is reasonable probability of the act being violated. So that the commission would investigate, either on its own motion or on the complaint of anybody else, and if they thought that

a monopoly did not exist then, as far as the machinery of that commission goes, you would not have any prosecutions by that commission.

Mr. CARLIN. Then you would not allow another piece of machinery to take it up and determine otherwise, would you?

Mr. LEWIS. Personally I believe that any Attorney General would be very much influenced and guided by the opinion of that commission, and I am entirely willing to let the matter rest in that case on the basis of the ninth paragraph.

Mr. FLOYD. In other words, you would create a commission, with the power to appeal to the courts of the country?

Mr. LEWIS. No. The commission merely, I would suggest, should have this power: It should have the power to investigate whether the monopoly exists; it should have the power to find out what is the basis of the monopoly, and if it is unfair trade, then the power to issue an order prohibiting it.

Mr. CARLIN. And if it is fair trade, then they should have the power to issue an order permitting it?

Mr. LEWIS. No; they would not have to do that. But they would break their oath of office, like any other administrative officer, if they found an act to exist and did not issue an order. They would be like any other administrative officer.

Mr. CARLIN. To bring this down to simple words, you would give it power to determine between the good and bad things being done?

Mr. LEWIS. No, sir; no more than any other body charged with the duty of administering an act. You say to a court, "If this act is done, you should issue an order to prevent it." The court investigates and finds out, in their opinion, if it is done. The court may be mistaken, but it has no discretionary power. Neither would this commission if the commission finds that unfair trade practices have been committed; it becomes its absolute duty to issue the order.

Mr. CARLIN. You are aware of the fact that there have been distinguished gentlemen in the politics of our country who contend seriously that there are good trusts and bad trusts, and I take it from your argument that you have about reached the same conclusion, that there are good combinations and bad combinations, and there ought to be a discretionary power vested somewhere to determine that fact without making a rigid rule which would apply to all combinations.

Mr. LEWIS. Of course I can not say whether my idea agrees with anybody else's or not.

Mr. CARLIN. I suppose you know who I mean?

Mr. LEWIS. I have not had any personal talks with him about combinations and I would have to ask him to explain exactly what he meant. If he means by a "good combination" a combination which does not produce monopoly, which does not produce unfair restraint of trade, which increases productive efficiency in this country—if he means by that "good," I agree with him. If, however, he feels some monopolies are good and some are bad, I disagree with him. Therefore, I would have to know how he uses those words.

Mr. FLOYD. You say you are in favor of giving this new commission authority, on their own initiative or on a complaint of others, to investigate the affairs of corporations and, if they find they are

engaged in unfair discriminative practices, to make an order prohibiting that?

Mr. LEWIS. Yes.

Mr. FLOYD. Suppose the company pays no attention to that order, what are you going to do?

Mr. LEWIS. That is a matter I was going to speak of. When an administrative order has been issued by an administrative officer under a statute prohibiting an act, and the company refuses to obey the order, the commission should have the right—the administrative body should have the right—to appeal to the courts to enforce the order. Now, the question of whether the courts would or would not enforce the order would come before the court, and the court would have to determine the question whether the commission had not abused its power by issuing the order. If they found it was an abuse of their power, then the court would refuse. In other words, you have got to allow—you ought to allow—an appeal to the courts to determine whether or not the commission has or has not exceeded its power. In other words, you have got to do for that trade commission, if you give them this power, what, in a slightly different form, you have done when you created the Interstate Commerce Commission and gave it the power to prohibit rebates and unfair trade and unfair practices. Now, the courts are the ultimate enforcers of the order, and if the courts think the determination of the commission is not in accordance with law, then they ought not to enforce it; and, of course, you have to have the appeal in that way to the courts. That is both right and proper.

Mr. VOLSTEAD. Is it your idea that the order of the commission would be binding upon the court so far as to the findings of fact?

Mr. LEWIS. Yes. I think where you have a trained body of men to investigate a certain fact, and they have investigated it in the manner in which, for instance, the Interstate Commerce Commission investigates a certain fact or things within its province, that then its findings of fact should be final as findings of fact but not as findings of law. In other words, on the facts as found, is the order a proper order under the law, should be a conclusion. In other words, the conclusion that the act done was unfair is a conclusion of law; what is done is a conclusion of fact; but that it is unfair is a conclusion of law based upon those facts. Therefore, if on the acts which were investigated by the commission they found that the company did a certain thing, then the fact that they did that thing ought to be final; but the commission's conclusion that that thing is an unlawful thing to do, because unfair, being a conclusion of law, should have a review in the courts.

Mr. VOLSTEAD. Would you have a review of the facts, too?

Mr. LEWIS. Personally, no, sir; I should not allow a review of the facts.

Mr. VOLSTEAD. Would there be some question of the right of a commisison of that kind to foreclose a corporation on findings of fact?

Mr. LEWIS. I should meet that by requiring this, that the commission should not come to any conclusion without holding an inquiry and giving to the coropration against whom the complaint had been or against whom the order was asked to be issued, the right to subpœna witnesses, the right to appear before it. In other words,

to give them all the safeguards of a full hearing on the facts and on the law, and then, on the law, let them have an appeal to the courts. But that point I wish to emphasize is this, that the creation of the expert machinery to investigate the facts and then to make an appeal on it from the facts to a body that is admittedly not expert, is nonsense. It results practically in this, that any sensible court practically never does review the facts? They do review the conclusions of law on the facts. It is useless machinery and useless expense to enable a double investigation, first by the body who had to investigate it and then by the old body, the court, which is crowded with other work and hardly fitted for an intelligent review of the facts, but intelligently fitted for a review of the law.

Mr. CARLIN. You stated that the commission should make an investigation, and if they found a certain practice was unfair, they would make an order prohibiting it.

Mr. LEWIS. Yes, sir.

Mr. CARLIN. Do you understand that there is any law now which makes any kind of a practice unfair as long as it does not conflict with the Sherman Antitrust Act?

Mr. LEWIS. Yes; there are a great number prohibited by the courts themselves. Unfair trade practices is a large branch of the law of torts, which has grown up by the individual decisions of separate judges, just like most of our law of torts has grown up. The Sherman Antitrust Act may add, and I think does add, a little to what I think we might designate the common law tort of restraints and monopolies, but outside of the Sherman Act there are a large number of unfair trade practices. Now, I do not think, sir—may I illustrate one of them?

Mr. CARLIN. Yes.

Mr. LEWIS. One of them would be, for instance, the old law of trade-marks, which grew out of unfair trade practices. The selling of my goods under your name, which is an unfair trade practice, has grown up entirely by the individual decisions of individual judges. I do think this, sir, that the courts in the last 25 years have not quite kept pace with the changed economic conditions. There is a necessity therefore, for the devising of an act which will indicate certain practices (which are now doubtful as to whether the courts will regard them as unfair) as being unfair. One of the illustrations of those practices, or two of the illustrations, are in this bill No. 1, to which I referred. In other words, discrimination in price as between the purchasers from a seller. I think that describes it; discrimination in price. Discrimination in price may often be unfair, and I do think it is necessary for us to pass a statute which will say it is unfair, because it is doubtful in the courts.

Mr. CARLIN. You are familiar with the interstate commerce act, so-called?

Mr. LEWIS. Yes, sir. I do not pretend to be an expert on it.

Mr. CARLIN. You know there is a certain section there which declares against unjust discrimination?

Mr. LEWIS. Yes, sir.

Mr. CARLIN. And makes unjust discrimination unlawful?

Mr. LEWIS. Yes.

Mr. CARLIN. Now, there is no such provision under the Federal Government which makes that law—there is no such law by Federal

statute which makes any kind of discrimination unjust in interstate commerce.

Mr. LEWIS. No; there is no such statute.

Mr. CARLIN. I mean by industrial corporations.

Mr. LEWIS. No, sir; there is no such statute for industrial corporations.

Mr. CARLIN. Now, then, what do you think of declaring by statutory act a similar provision to industrial corporations that we have ascribed to common carriers?

Mr. LEWIS. As I have said, sir, the essential steps, in my opinion, at least the essential steps to meet the problem of monopoly—one of them is the passage of a statute which will make it absolutely certain that unfair trade practices done by persons engaged in interstate commerce are prohibited by Federal law. If you are interested on that subject, House bill 9300, introduced by Mr. Murdock, reads in this way—and that bill I should regard as one of the essential steps—it is, "That unfair or oppressive competition in commerce among the several States and with foreign nations, as hereinafter defined, is hereby declared unlawful." Then, in defining what is unfair trade competition, "That unfair or oppressive competition as used in this act is hereby defined to include the following business practices and transactions." Now, then, the business transactions, which are some seven or eight in number in that bill, are defined not in particular but in general language. I do think you ought to define them in general language, and I believe such a bill as this is the central step.

Mr. Chairman, I have taken up a great deal of your time, and there are other gentlemen here who have come with me and will follow me. I have nothing more to say personally, unless it is the desire of the members of the committee to ask me some questions. I am very much obliged to you, gentlemen.

The CHAIRMAN. I want to ask you a question, Mr. Lewis. You say that we ought to define these practices, all these things that are enumerated in this last bill. How would we define them any more specifically than the bill itself does?

Mr. LEWIS. I think I can illustrate that, sir, by the difference between the way the matter of interlocking directorates is defined in the bill which you introduced, sir, and which I referred to as being wrongful and the way in which it is spoken of and pointed out as a form of unfair competition, which is prohibited in House bill 9300. In that bill it is stated that unfair or oppressive competition is, among other things, "(G) The destruction of competition through the use of interlocking directorates." "A destruction of competition through the use of interlocking directorates"—I am not certain whether that is not too narrow a definition to avoid all possible trouble, but the difference between that and an entire bill pointing out exactly certain kinds of interlocking directorates which are prohibited illustrates the difference between the points of view of Mr. Murdock's bill and the bill which you introduced, sir.

Mr. CAREW. You think Mr. Murdock's bill, H. R. 9300, is a good bill, do you?

Mr. LEWIS. Yes; I think it is a good bill.

Mr. CAREW. What do you think of reading section 3 of that bill, at top of page 2, and then skipping over to subdivision 8? Do you think that is a good example of definition?

Mr. LEWIS. I think that is absolutely essential to any bill that you pass.

Mr. CAREW. You say you think that is a good example of definition—unfair or oppressive competition as used in this act is hereby defined to include any other business practices involving unfair or oppressive competition.

Mr. LEWIS. May I answer that question?

Mr. CAREW. Yes.

Mr. LEWIS. I wish to answer it in this way: At the present time you have at the common law the general rule, not defined more particularly except in this general nature by the courts, that unfair and oppressive trade practices are unlawful. The courts hold that power to-day, being responsible only to themselves to take a practice as it arises under the facts presented to them, and to say whether it is unfair. If you are going to create a power to prevent unfair trade practices, why, it is all right to indicate in your bill, as has been done here, in all these letters down to and including "G" that certain practices described in general language are unfair; nevertheless, unless you have the particular "H," which you have referred to, sir, what do you do? You tie the hands of your commissioners and confine them merely to prohibiting a certain class of unfair trade competition and not all.

Now, suppose that in the exercise of the very broad discretion which you now lodge in your courts, and by this act, if you adopt this bill, you will lodge in the commission the power to determine any other practice as being unfair and they determine that it is—it is a new practice which you did not know anything about now; it is unfair—and they prohibit it, there is still the right of appeal to the courts. And what will the courts do? This "H" is merely expressive of the common law of what unfair trade practices are to-day. In that indefinite sense of "unfair" the courts will determine whether or not the commission was right in holding this particular practice unfair. If they differ with the commission, then they will not enforce the order of the commission and the commission withdraws it order. If they agree with the commission, that the comission wisely exercised that discretion, they will sustain the order. You have protected the individual and you have created a commission with sufficient power to meet new forms of old wrongs, an old wrong of unfair trade competition which has been going on for centuries as they arise.

The CHAIRMAN. What you propose, then, is for us to allow the courts and this commission to develop a common law in the future of what they consider unfair?

Mr. LEWIS. I propose you should not let the courts, because the courts are new doing it—you should allow the courts to be assisted by the commission, first to determine the fact whether it is unfair, with the right of appeal to the courts.

Mr. VOLSTEAD. And would you have the commission investigate al violations of the Sherman Antitrust Act?

Mr. LEWIS. Certainly; I think, sir, the administrative task put upon this commission by this bill 9300 and the bills 9299 and 9301, the administrative task which carries out the theory which I have been trying to explain here, is one which completely meets the trust problem. I should not advocate the abolition of the Sherman Act,

but I think that practically the adoption of these three bills will render further proceedings under the Sherman Act largely unnecessary by effectively preventing monopolies. Now, such proceedings are the only means we have. Therefore, to answer your question direct I should allow the Sherman Act to be administered exactly as it is adminitered now.

Mr. VOLSTEAD. How would you be able to draw the line between the new legislation and the old? It seems to me that the Sherman Act in some form or other covers everything that we are asked to legislate into law at the present time.

Mr. LEWIS. The Sherman Act entirely proceeds from the position that combinations of all forms are bad and should be destroyed, and my own view is that it is entirely inadequate to meet the problem of monopolies, and any atempt to amend, as these three bills do, is not even clarifying it and in no wise meets the trust problem. Therefore, I must differ with you, sir, when you say that the Sherman Act covers the thing which you are trying to do, if what you are trying to do is to prevent monopoly in this country.

Mr. CARLIN. I will ask you if you have ever examined bill 1890, found in this large book on page 85, at the bottom of the page?

Mr. LEWIS. I do not think I have. [After a pause.] No, sir; I have not examined that bill.

Mr. CARLIN. I would like you to read section 4 and see if that covers to some extent your idea. [After a pause.] Now, what do you say of section 4? It seems to be along the same line you have in mind.

Mr. LEWIS. That every practice, method, means, system, policy, device, scheme, or contrivance used by any corporation within the meaning of this act in conducting its business, or in the management, control, regulations, promotion, or extension thereof, shall be just, fair, and reasonable, and not contrary to public policy or to the injury of public welfare, etc. Yes. In other words, as I understand this section 4, it is that there is a doubt to-day whether unfair trade practices between two persons engaged in interstate commerce is contrary to the laws of the United States.

Mr. CARLIN. Yes.

Mr. LEWIS. And that it ought to be made by some declaration contrary, and that this does that; and that does it in very general language, as far as my hurried reading enables me to say. Therefore, I should say that section, as I have read it, standing entirely apart from the rest of the bill, which I have not read, is in general accord with the purposes of House bill 9300, as far as that purpose is defined, to make such acts unlawful.

Mr. CARLIN. That is Mr. Murdock's bill.

Mr. LEWIS. Yes. This bill is the central administrative step. It not only makes those acts unlawful, but it gives the commission the power of administration of those acts.

Mr. CARLIN. This bill in another provision does the same thing.

Mr. LEWIS. That I do not know, sir.

Mr. MITCHELL. Did you prepare any of those bills, Mr. Lewis?

Mr. LEWIS. No, sir; I did not. Those bills were prepared by Mr. Murdock, all three of them. He asked the legislative reference committee of the Progressive Party, of which I am chairman, to assist him by progressive criticisms in the preparation of those three bills,

and we lent him assistance. But they are Mr. Murdock's bills. I have been consulted in their preparation, but I have not prepared them.

Mr. CAREW. Have not the courts, as already constituted, found a sufficient remedy for these unfair practices you refer to as having been developed into an unfair system?

Mr. LEWIS. Yes.

Mr. CAREW. You refer to falsification and fraud, assault and battery, and things of that kind, things which have been condemned by the common law. That is what you mean by "unfair"?

Mr. LEWIS. That may be part of the unfairness. Falsification is, strictly speaking, always an unfair trade practice, if done for the purpose and with the result—as taking the name of your rival's goods as your own.

Mr. CAREW. What other practice would you call unfair?

Mr. LEWIS. The boycott is unfair.

Mr. CAREW. Any other?

Mr. LEWIS. Underselling for the purpose of driving your rival out of a market is unfair.

Mr. CAREW. That is a new one.

Mr. LEWIS. Yes. I use that illustration so that I might answer your question, sir, as to whether the courts, as already constituted, have found sufficient remedies for these unfair practices. I think what has happened is this, that in most tort cases the courts have discretion to mold general principles to meet circumstances. They keep the law abreast of the actual necessities of the subject, and they did so in unfair trade competitions up to about 25 years ago, when the increasing complications put the courts a little too far behind to meet the existing conditions.

Mr. CAREW. Pardon me for a moment. Now, in the case where the courts have, according to you, kept up to public sentiment, isn't it a fact that all men have agreed, of course, that falsification is wrong, and that tort is wrong?

Mr. LEWIS. Yes.

Mr. CAREW. But of these new unfair practices you want to condemn, isn't there quite a disargeement among men as to whether they are unfair, as to whether, if you condemn them, you will not hamper ordinary business life? Is not that the reason the courts have not kept right up, as far as the Progressive Party has—isn't it because we are not all agreed upon those things?

Mr. LEWIS. I think that this is true—I think that a boycott which is a trade boycott of saying of one trader to a person who is buying goods from him, I will not sell to you if you buy from the other man—that that process unfortunately some few courts have not held as being unfair, while others have held as being fair.

Mr. CAREW. A great many individuals regard it fair, don't they?

Mr. LEWIS. I do not think there is now any serious doubt among any persons who have investigated our industrial conditions at all but what it is wrong.

Mr. CARLIN. What do you think about a boycott by the labor unions?

Mr. LEWIS. I think the courts have always held the boycott of labor unions unlawful. They have not always held a trade boycott unlawful.

Mr. CAREW. There is a very vigorous fight in favor of labor unions. A great many men believe it to be unlawful to boycott. What you want us to do is to crystallize the law to your difinite ideas, although a great many men have hesitated and have not made up their minds.

Mr. LEWIS. I assume that the bill put in by the chairman makes a trade boycott unlawful and makes discrimination in price unlawful. The present opinion, and I believe it is the great weight of opinion on that subject, is that to effectively prevent monopoly you have got to direct the courts to go that far and prevent those things, those practices, if you are ever going to prevent monopoly.

Mr. CARLIN. This committee is being asked to except labor unions and agricultural and horticultural associations from the operations of these statutes and the Sherman law. What do you think of that proposition?

Mr. LEWIS. I think of that proposition, sir, that as far as you are contemplating, if you are contemplating the establishment of a commission, that the problem of monopoly, if that be a monopoly, and the problem of the regulation of competition between traders is one distinct problem, and that you should deal with it along these lines; that the problem of the labor market, if I may put it that way, is another distinct problem, while there are many features that are somewhat similar. Therefore I believe, personally—you ask me the question—that this bill should confine itself to trade conditions and not to labor conditions.

Mr. CARLIN. Now, there is a similar bill pending here, known as the Bartlett-Bacon bill, which could be taken up as a separate subject, which would except labor and agricultural and horticultural societies.

Mr. LEWIS. Except, you mean?

Mr. CARLIN. Yes; except them from the operation of these laws.

Mr. LEWIS. They do not carry on business, as I understand—these agricultural associations.

Mr. CARLIN. I am not going into that. This bill exempts them from the operation of the Sherman law.

The CHAIRMAN. Yes. Mr. Seth Low was in the other day, and he described a farmers' cooperative association in which they formed an organization for the purpose of buying and selling things for the use of the farmer. He takes the ground that they should be exempted—that such an organization should be exempted.

Mr. CAREW. Now, the gentleman has intimated, Mr. Chairman, that he thinks there should be one law for traders, and another law for laboring men, and another law for farmers, and, I assume, another for lawyers.

Mr. LEWIS. May I respond to that? I think I can probably save the committee some time.

Mr. CARLIN. I will ask you whether you think that wise legislation or not—bill 1873?

Mr. LEWIS. My answer to that is this: The production and selling of commodities is one thing; that the regulation of the purchase and sale of labor, wages, and that problem is another problem; and that

they ought to be dealt with, therefore, separately. I do not believe in a separate law for lawyers. I see no necessity for it. Now, you ask me in regard to this bill, and I am going to ask to be excused from a direct reply, because it is a subject which I have not had an opportunity to investigate. If these persons engaged in agriculture are engaged in business, and it is their business and not some voluntary association apart from their business that is being regulated, then I think they should be regulated in any act which regulates business. But if these associations are associations not for carrying on a business—I think the words "carrying on" embraces what I mean—if their association is not for the carrying on of business, if they are like labor unions, for instance, who do not carry on business, then I do not think we should deal with them in this legislation.

The CHAIRMAN. As I heard them described—these farmers' cooperative societies—they, through their cooperative store or their organization, buy and sell pretty largely agricultural implements for themselves, they say, and they dispose of their products by this cooperation.

Mr. CARLIN. Or combination.

Mr. LEWIS. I now see what kind of an association they are, and my answer would be, why the difficulty you are in with these associations is the difficulty of the Sherman Antitrust Act, which condemns all combinations, whether engaged in commerce or not. I do not know whether these associations lead to monopoly, but if they do not lead to monopoly they should not be condemned.

Mr. CARLIN. Mr. Gompers has admitted before this committee his associations can not exist, labor organizations can not exist under the Sherman law except by license of the Attorney General's office. Now, what I am trying to get you to say is whether they ought to be exempted from the Sherman Antitrust Act.

Mr. LEWIS. Certainly. It is not an association for the purpose of carrying on or conducting a business. As to the regulation of labor unions, they could not be regulated in a bill devised to regulate business. Now, if the Sherman Antitrust Act is to regulate business, if that is its object—combinations in business—why, it should not apply to labor unions. I have always understood that was the object of its framers. I entirely approve of the object, if not wholly with the solution as a complete solution of the problem; but I do not think it ought to include labor unions.

Mr. CARLIN. You think the labor unions ought to have the right to exercise a boycott? That is provided in the Bartlett-Bacon bill.

Mr. LEWIS. That is a wholly different thing. What to do with the labor unions is another matter. That, I understand, is not the object of the legislation now in contemplation. The object of the legislation now in contemplation, and what I am here primarily to suggest in regard to, is legislation in regard to the regulation of business. Labor unions are not in business. Now, whether laborers should go around and boycott other laborers—that is another question.

Mr. VOLSTEAD. That is the question in that bill.

Mr. LEWIS. I think it ought to be dealt with as a separate matter. You should not deal with it as a part of the antitrust legislation.

Mr. CARLIN. But they ask to be exempted from the operation of the statutes which they contend——

Mr. LEWIS. What statutes?

Mr. CARLIN. The Sherman antitrust law.

Mr. LEWIS. I agree with that. If that is the question, I think they ought to be exempted from the operation of the Sherman Antitrust Act, and for this reason the Sherman Antitrust Act deals with business and these associations are not in business. Therefore, they should be excluded. A decision of the Supreme Court is that they are under the act. Well, I do not think that was the intention of the framers of this act. I have no criticism of the decision, in view of the language of the act, but I do not believe it was the real intention of the framers; and even if it was I am a very strong believer for solving problems by an attempt at least to analyze them when they are different. Now, your labor problem in this country is one problem, and is a big problem.

We are not here this afternoon, as I understand, to discuss that problem. The other problem, the regulation of business, the prevention of monopoly in business, is entirely a distinct problem, and you will never solve either of them unless you separate them. Therefore if that bill takes the labor union out of the Sherman Antitrust Act, why, I agree with it to that extent.

Mr. VOLSTEAD. If they legalize the secondary boycott, are you in favor of that proposition? That is practically the main feature in that bill.

Mr. LEWIS. I am opposed to boycotts of all kinds, as far as I have been able to see boycotts.

Mr. VOLSTEAD. My understanding is that is the only reason why they held these labor organizations were amenable to the Sherman Antitrust Act. I say that because I think you ought to understand what you are asked about before you answer it.

Mr. LEWIS. Even if I do not wholly sympathize with all they are asking, I do sympathize with this: Here is a statute to regulate business, and here is an association that is not in business and it is being regulated. It has no special problems that have been considered by the legislature. Two things that have no relation to each other have been put together and, unwittingly, I believe, and I am in entire sympathy, without making any snapshot judgments as to what should be done in the situation, that to solve this broad situation you should have your trade bills—and I understand the Sherman Antitrust Act is one of them—separate from labor bills.

Mr. CARLIN. Labor is one of the instruments of business, just exactly as common carriers are instruments of commerce.

Mr. LEWIS. Yes.

Mr. CARLIN. Therefore we have gotten them now into the meshes of the Sherman law, and they are protesting against that and asking relief, and in asking that relief they are, of course, asking to be permitted to continue their practices of the boycott; and I am asking you whether you think that excepted class, with that privilege, ought to be considered in this legislation, or whether we should enact any legislation?

Mr. LEWIS. I should answer the first question that you should separate them from the Sherman Antitrust Act and take up their special problem and go to the bottom of it, if we can, to see what is

the reason why they wish to be exempted from boycott legislation, find out whether the so-called boycott in their case is a real boycott or not, whether they are trying to get away from a name, or whether they are trying to continue a crime and be immune from the crime. That you will never find out until you separate the labor problem by itself.

Mr. CARLIN. You know what a boycott is in common acceptation?

Mr. LEWIS. Yes.

Mr. CARLIN. That is what I am talking of now, just as we commonly understand it, and that is what I am trying to get you to express an opinion on, as to whether you approve of labor unions being permitted by statute to exercise that power.

Mr. LEWIS. I do not think, if I may say so, that we do understand entirely what we mean by saying "boycott." We know what we mean by a boycott in trade. It is the exercise of economic pressure on customers to deal with you and not to deal with the other fellow. It is saying to a man: "I won't deal with you if you deal with him." Now, that it wrong. Let me give you one illustration which shows you that you should separate the problem of labor from the problem of business.

Mr. CARLIN. Mr. Lewis, I do not want to interrupt you, but I am trying to get from you a simple answer.

Mr. LEWIS. I refuse a simple answer to a question that is not clear and can not be clear, and any answer made can not be clear until the complications involved in the question are clear.

Mr. CARLIN. I am trying not to make the question complicated. I am trying to get your idea upon the propriety of legislation permitting what you commonly understand to be a boycott, without going into the realm of what might be considered a boycott.

Mr. LEWIS. I am trying to give two simple illustrations to show the necessity of separating the two problems in dealing with them separately, and the difficulty of answering generally "yes" or "no" to your question in regard to labor.

Mr. VOLSTEAD. We have had a grocers' association, a druggists' association, a lumbermen's association, a plumbers' association, and various other associations, some of them voluntary, none of them engaged in business, appear before us and demand the right of boycott. Now, is there any reason that occurs to your mind why there should be a different rule applied to labor organizations and to those associations?

Mr. LEWIS. If you will let me give my illustrations, I think I can show to you there are at least differences in the problems which should be considered. The illustration is this, where a number of laborers undertake to work on a building. The building is being constructed and is being constructed by our labor. A person is put on that building we do not wish, and we say to the owner, or the person who employs us, "If you do not discharge that person, we will strike;" that is a boycott, is it not?

Mr. VOLSTEAD. No.

Mr. LEWIS. That is my understanding of "boycott." It shows you how difficult words are.

Mr. VOLSTEAD. I suppose that is a primary boycott, but it is not a secondary boycott.

Mr. LEWIS. That might be held a boycott in general terms, and is one which the courts in most cases have held to be and in some cases not. They have differed on the problem.

Mr. CAREW. What do you think about it?

Mr. LEWIS. As I use the word "boycott" in its broad sense, that is a boycott. If I answered the gentleman's question "no," for instance, if I could not make any distinction, I would be put by any use of the word "boycott" into the position of saying under those circumstances those laborers have not the right to do that. I think they have in many circumstances.

Mr. CARLIN. What circumstances, for instance?

Mr. LEWIS. I think if this is true, that they have a right to do that unquestionably in those circumstances—that this building in which the occupation of building is dangerous they would have the right to see that the men they work with are men who are skilled in that business. Else their lives are in danger. Therefore, they have, of course, in the construction of that building the right to say that same thing. Now, if their motive is merely to injure this man who comes to them, if that is the only motive—they have some grudge against him—why you have another set of circumstances.

Mr. CARLIN. Suppose, taking your illustration—I do not think it is what I had in mind, exactly—suppose it is admitted that these men who are occupied in the construction of the building are men of equal capacity and equally good habits, but a portion of those men are members of a union and another portion are not members—do you think, then, they have the right to prevent that building from being constructed or their members from going on with the work, or that they should have the right by statute.

Mr. LEWIS. I think a man should have the right to work with those he wants to or not, as he chooses.

Mr. DYER. And you have a right to prevent others from working?

Mr. LEWIS. We do not have the right to prevent others from working, certainly not.

Mr. DYER. Is that a boycott?

Mr. LEWIS. For instance, I think he has the right to say, if my cook does not like my butler, I think my cook has the right to come to me and say, "I will go, unless you discharge the butler." That is a different problem entirely. Then, if I am going in the market and I am selling tobacco and I come to you, a retailer, and say, "If you want my tobacco—I know my tobacco is necessary to you; you can not go into the retail tobacco business without my tobacco—and I come to you and say, "buy my tobacco and only mine, or I won't sell any tobacco to you at all," that is one class of problem. The cook problem I put to you is another problem. You have got to separate them.

Mr. CARLIN. Take the case of your cook: Do you think your cook ought to have a statutory right, after exercising a personal privilege of retiring from your employ, to go around to your customers, whom you deal with in business, and say, "That fellow is not friendly to cooks and we do not want you to deal with him; and if you do, we won't deal with you any more." Do you think he ought to have that right?

Mr. LEWIS. I think that is another problem.

Mr. CARLIN. I know it is another problem, but I am asking you if you think he ought to have a statutory right to do that?

Mr. LEWIS. I will answer that question in this way; I do not know the circumstances which justify that. I am not an expert on that subject, and I will state frankly to this committee I have not given to that subject the thought which would enable me to reach a conclusion, and to advocate before you legislation one way or the other. I would be interested to hear those who are connected with labor unions and see what their point of view is and why they want this privilege which apparently is a secondary boycott, as has been explained; and after I heard their reasons and gave time to the subject, I might come to the conclusion, probably would, as my instinct is, that it is not. I guess the instinct of pretty nearly every one, labor unions and everybody else, that has thought of the thing, is it needs a good deal of justification to support it; but I do not say here it is a good or bad thing positively. My opinion on that matter is an opinion which is distinctly not an opinion of an expert. I have never looked into it up to the present time to ascertain and come to a positive conclusion why that secondary boycott was regarded as necessary. It should be justified by some positive reasons, or it is a wrongful boycott; I admit that. But, farther than that, I do not like to go.

Mr. CARLIN. I will not press you any further, but my reason for pressing you as far as I did, was I understood you to say you were a member of the executive committee of the legislative committee of the Progressive Party.

Mr. LEWIS. Yes.

Mr. CARLIN. It was the position which you held in that connection that led me to suspect, perhaps, that you had considered labor questions along with other questions.

Mr. LEWIS. That committee considers, sir, and gives information when we are asked by legislators who are members of the Progressive Party, to assist in the preparation of any legislation to the best of our ability, members of the committee who have some prior knowledge of that subject, who has been asked to help them. That is the extent of our province. They have been asked by Mr. Murdock to make suggestions as to certain bills, and the three gentlemen who are here before you to-day have devoted some time to that subject and therefore feel we can speak to you, but on the question you ask in regard to labor unions, we do not feel we can speak to you.

Mr. CARLIN. I want to ask you just how this executive committee is formed—this executice committee of the legislative committee.

Mr. LEWIS. I beg your pardon, sir, but there are two things that are linked in the question. I am chairman of the legislative committee, of the legislative reference committee, of the National Progressive Party. That committee has the duty merely of assisting Progressive Members of Congress or State legislators who ask their assistance. Now, there is another committee in your mind, evidently, sir, from your question, which is this: It is the committee which was appointed by the late Republican State Convention in Pennsylvania, known as the legislative and State committee of the State of Pennsylvania. That convention drew a platform and they did what no convention did before, but which several conventions have done since—they appointed a committee to draft such acts which they designated to carry out the pledges of the platform which they drew.

I happened to be a member of one of the subcommittees of that committee, which has nothing to do with the committee which has given advice to Mr. Murdock on these bills.

Mr. CARLIN. How is that committee organized?

Mr. LEWIS. That committee was appointed by the convention, the late Republican State convention, which went out of existence with the last legislature.

Mr. CARLIN. I mean, the committee of which you are chairman—how is that formed?

Mr. LEWIS. You mean the legislative conference committee?

Mr. CARLIN. Yes.

Mr. LEWIS. The members of that were appointed by the national committee of the National Progressive Party.

Mr. CARLIN. Of how many does it consist?

Mr. LEWIS. I think I am right in saying there are 11 members.

Mr. CARLIN. And you only advise members of the Progressive Party?

Mr. LEWIS. Yes. It is a committee confined to that duty. As an individual, sir, I am always willing to advise anybody on a matter which I know something about, but I have got to first know something about it. But as chairman of that committee we confine our labors to assisting members of our party.

Mr. CARLIN. At the present, as far as you know, is the legislation relating to trusts the only legislation you have in mind that is pending in Congress?

Mr. LEWIS. Pardon me, sir. There are 11 bills which have been put in on which we have given some advice; very little on some and more on others. Different members of our committee advise on different bills, but personally my own work has been to advise on these particular bills, perhaps, more than on any others.

Mr. CARLIN. Of course, their service is perfectly patriotic?

Mr. LEWIS. Unquestionably patriotic, if you mean by that it is not remunerative. But I do not wish to be put in the position—I think, Mr. Chairman, I ought to say this, as Mr. Murdock is not here to-day, being in the West—that these bills are Mr. Murdock's bills. Our duty is not to draw these bills, but our duty is to give such advice and assistance as we may, and we aid the Progressive Party as a whole and the Progressive Members of Congress, and render them such assistance as possible whenever requested. We believe this is very serious legislation, and it is worth while to get all the expert assistance possible, and therefore these bills have been prepared by Mr. Murdock with every advice he could get; but they were begun away last spring, and there has been continuous labor on these bills for months, and we do believe very strongly, all of us, in that way of preparing bills.

Mr. CARLIN. Did you all have before you the Morgan bill when the Murdock bill was revised? Did your executive committee have before you the Morgan bill to which your attention has been called to-day?

Mr. LEWIS. No. Our advice was confined as to what should be put into these bills from our point of view and what research we could make into the matter.

Mr. CARLIN. Did you have before you the Morgan bill at that time?

Mr. LEWIS. Not personally. It might be other members of our committee had. I gave certain suggestions on the bill and other members certain other suggestions.

Mr. CARLIN. The reason I mention that to you is that Mr. Morgan or some of his friends think you all have stolen his thunder.

Mr. LEWIS. In so far as I am responsible for some suggestions in the bill, I was unconscious of theft. I was a kleptomaniac.

Mr. MORGAN. You understand, Professor, he has to have his joke.

Mr. LEWIS. I understand the joke.

Mr. DYER. There was a question asked you concerning this bill of Mr. Bartlett about these associations of agriculture and horticulture whether you had given that sufficient thought to answer the question as to whether they should be taken out of the operation of the Sherman Act along with the labor organizations.

Mr. LEWIS. Personally, I think that should at the present time be left to the determination of the commission with an appeal to the courts—the determination whether they are engaged in business. If they are not, that the jurisdiction of that commission should be confined to those who are engaged, who carry on a business. It should include all that carry on business, but not those associations which do not. Therefore, the question whether these associations which are now being formed, which are comparatively new in some of their aspects, particular industrial factors in a community, should be included or not is, frankly, something I do not think the Congress should decide. If they should simply decide to give to the commission control over corporations engaged in business between the States and define the word "corporations" to include any association engaged in business, and then first to the commission, with appeal to the courts, put the question up to it whether this particular agricultural association involved is or is not engaged in business. If you do not do that you will get into trouble, because the forms of these associations are, as I understand it, rapidly changing what they are doing. Whereas, if they were purely beneficial and informational to their members—they are now doing a certain amount of collective selling and not collective producing—if you try to solve all of these problems and say exactly what associations, instead of saying merely, in general language, any association that carries on business is subject to this act—if you tried to enumerate what kind of associations do or do not carry on business, you would do the same sort of thing which, in my opinion, is fatal to the three bills introduced by the chairman. With the best possible motives, he has tried to define the crime by specifying the ways it can be committed. You can not specify what carrying on business is by defining different kinds of organizations that carry on business. Do not draw that kind of a bill, or you will simply draw it for the benefit of lawyers.

Mr. CARLIN. This language is plain. I do not know whether it comes within your definition of carrying on business or not, but here is the language of the bill that is proposed, which means, transposed, that no person or persons may enter into any arrangement, agreement, or combination among themselves for the purpose of engaging in horticulture and agriculture with a view of enhancing the price of agricultural or horticultural products.

Mr. LEWIS. I would leave it all alone, sir; I would leave it all alone. I would simply say that your commission has power over those who carry on business. Now, if this association actually comes before the commission, being cited by the commission, and the commission says it is carrying on business, let the actual facts of the case be examined by the commission, with an appeal from its conclusions to the courts.

Mr. DYER. How would you amend the Sherman law?

Mr. LEWIS. I think the only amendment that is arguable to the Sherman law is to make it read "That this act shall not apply to persons who are not engaged in carrying on business," but do not touch it as a definite thing.

Mr. CARLIN. We have to meet here, as legislators, propositions that are brought seriously before the committee by responsible citizens, and you would have to meet those same responsibilities if you were chairman of an advisory committee to a legislative body, either of a particular party or of all parties, and that is the reason I asked you whether a statute would meet with your approval which would permit combinations among agricultural and horticultural associations for the purpose of enhancing the price of their products.

Mr. LEWIS. Personally, sir, I do not think that I can answer that off-hand. I do not think I could agree to an act worded as that act is worded. All I can say is to repeat that if these associations do not carry on business, then they should not be restrained from combining.

Mr. DYER. Is it not carrying on business when they enter into an arrangement as to the prices of their products?

Mr. LEWIS. Again I would like to be excused from answering a question to which I had not given any thought. In other words, what is carrying on business in these associations does not depend upon that particular act of getting together and putting up the prices, but upon that act and a whole lot of other acts. In other words, carrying on business is a thing that you can not define any more than to say "carrying on business," and nothing else.

Mr. CARLIN. Now, this is not a hypothetical question I am putting to you, but if you are going to engage in the business of legislating or advising legislation, you have got to meet this question just as we meet it, in a spirit of fairness and frankness, and we are here dealing with this problem and you are here to give us information, and I am asking you for it.

Mr. LEWIS. Yes, sir.

Mr. CARLIN. Now, this is seriously proposed: That we shall permit a dozen or 500 farmers to form an association, and, whether carrying on business or carrying on anything else, to combine to raise the prices of their products, and I ask you the plain question, whether or not such a statute would meet with your approval?

Mr. LEWIS. Might I ask you whether it meets with yours?

Mr. CARLIN. Yes, sir; I think it does.

Mr. LEWIS. Might I ask you again whether you have had this question before you for some time or whether this is snap judgment on your part or the result of consideration?

Mr. CARLIN. This bill was introduced on the 7th day of April, 1913, and it has been before this committee ever since its introduction.

Mr. LEWIS. Yes. You have had that question before you for some time.

Mr. CARLIN. No; we have not. The committee has not been in session until recently, but the question has become acute now because of this proposed antitrust legislation.

Mr. LEWIS. I can not imagine how you could answer that question without consideration of all the facts bearing upon it.

Mr. CARLIN. Well, I have answered it.

Mr. LEWIS. Of course, after a careful consideration of the facts bearing upon it——

Mr. CARLIN (interposing). I have already answered it.

Mr. LEWIS. If you have answered it without careful consideration of the facts bearing upon it, and the reasons pro and con, if you have answered in that way you have a power of intuition such as I have not.

Mr. CARLIN. Then I will ask you to give this suggestion such consideration as you might think you would like to give it, and then answer my question.

Mr. LEWIS. I shall try to do it.

Mr. CARLIN. And then answer my question directly as I have answered yours.

Mr. LEWIS. Unquestionably, when I come to a conclusion you will have a direct answer, provided I have the opportunity.

Mr. CARLIN. Let us have your answer within the next two or three weeks.

Mr. LEWIS. I should be very glad to answer you if I can, but at the same time you must remember that my responsibility is not yours.

Mr. CARLIN. I am thoroughly familiar with my responsibilities.

Mr. LEWIS. When you ask me that question you simply ask me as one man asking a friendly question of another: "If you have an opportunity to look up this question, won't you try to look it up and make it a business of giving me an answer?" I can try, but I can not promise you here that within the next three weeks or within the next three months I shall have the adequate time to give to such a momentous question as this the consideration it deserves. I thank you very much for the hearing you have accorded me.

Mr. CARLIN. We are much obliged to you.

STATEMENT OF MR. DONALD R. RICHBERG, 109 EAST FIFTY-SIXTH STREET, NEW YORK CITY.

Mr. RICHBERG. Mr. Chairman, it was the intention of the three gentlemen presenting themselves to-day to endeaver to present a concrete constructive program and express certain opinions regarding the program before the committee. It was the intention that Dr. Lewis would outline the principles upon which trust regulation might be based, and then I was to discuss the mechanical means for carrying out those principles as proposed by these Murdock bills, and then Mr. Herbert Knox Smith would describe the method of precedure under the present laws and previous laws of the same kind. Now, as the hour is growing fairly late, I wish to ask the indulgence of the committee to be exceedingly brief in a narrative résumé of the theory outlined by Dr. Lewis, and I trust I may be permitted to make a rather short dogmatic statement in so doing.

Just to sum up the theory upon which we are trying to approach this legislation, and upon which it seems to me it should be approached, it is aparent that the crux of the matter of dealing with monopolies or unfair business is not to attack the method but to deal with the power, and therefore, our solution is, first, to get a commission with full power to gather all the facts, and then give it power to suppress unfair methods, and the only way to terminate unfair practices is by the creation of a proper commission with power sufficient to carry out its orders. Then, there is the question of handling monopoly. It seems to me as to that that the only method of handling it would be by commission, and the only method of dealing with monopoly is to attack not the theory or the method but the form; that is, some noncompetitive factor in the industry. As opposed to that theory, which we believe to be the sound theory, there seems to be a present consideration of what might be termed administration measures before this committee, regarding the continuation in a commission of the power which has remained heretofore in the law to prohibit certain illegal acts and to punish the individual violating the provisions of the prohibitory act.

Now, as distinguished from that theory and the program outlined in these bills, I shall ask leave to read a short succinct statement in order that I may be able to get the matter before the committee in concise form.

A government that proposed to destroy all big, strong men in order to protect little, weak men, would be ridiculed.

Yet our Government is seriously proposing to destroy all concentrations of business in order to prevent abuse of the resultant strength. Children hate the hot sun and the wet rain. Mature persons protect themselves from the heat and the wet while utilizing the sun and the rain. They do not pray that the sun and the rain shall be done away with. A mature government might utilize the analogy.

The evils of monopoly do not lie in the concentration of vast resources nor in handling of enormous business by one organization. The power of big business is its menace and the abuse of that power is its sin. That power lies in the ability to determine price policy. The admnistration bills deal with big business as with an inherently vicious thing, just as ancient law dealt with the criminal as a person essentially different from law-abiding persons. The modern criminologist recognizes that the criminal is merely ordinary flesh and mind perverted to bad uses. The monopolistic concern is large business perverted from public service to public exploitation.

The administration bills only attacking the methods and forms of monopoly provide for an inquisitorial body to get the facts, then prohibit indiscriminately unfair business practices and practices that may bring about unfairness and finally prescribe the punishment of the individuals engaging in either kind of practices.

The Progressive proposals exhibited in Congressman Murdock's "trust triplets" aim to distinguish between a vice and an abuse of power. Unfair trade practices may be to a certain extent defined and prohibited, as inherently vicious. But when the field of monopoly is reached the wrong to be prevented is abuse of power and the effort to prevent the mere development of business to the point where monopoly may be threatened is merely the destruction of strength in fear of the abuses of strength. It is the Progressive idea that busi-

ness should be allowed to grow, but that its responsibility to the Government and the power of the Government to enforce that responsibility should keep pace with that growth.

The power of the Government to cope with the power of concentrated wealth must be lodged in some instrument of administration. The judiciary is not equipped for the task, nor is it consistent with judicial functions. The legislature can only take cognizance of principles and measures for their expression. The power of the Government to develop its strength constantly to maintain the interest of all the people against the selfish interests of strong groups operating with large resources must therefore be lodged in an arm of the administration.

Assuming, therefore, the interstate trade commission as the embodied governmental power, it must be granted the authority to limit the power of any private enterprise within the field of active or potential competition. If a private organization challenges the authority of the Government, the commission must be empowered to maintain the supremacy of the public interest. If the "obligation of public service" is accepted as by common carriers, there is no monopolistic power—no ability to determine price policy.

But if a concern not under this obligation yet exercises monopolistic power the issue is plain—either the Government is to control private business or private business will control the Government. The third Murdock bill provides in this emergency that the Government may for a brief term of reorganization control the monopolistic concern through "supervisors." This assertion of control is analagous to a reformative imprisonment, whereby the individual who will not subordinate his profit making to the community interest may be deprived for a time of community freedom. The corporation is created as a business unit to relieve individuals of responsibility. When the corporation offends it is most appropriate and most effective to deal with it as a unit. The "personal guilt" of the individual is an outlet for escape from joint responsibility. The "personal guilt" of a corporation is a trap wherein to catch all the responsible indiviluals.

There is no monopolistic power if there is no price policy. I want to point out the difference between a monopoly in fact and the exercise of monopolistic power. A public-service corporation may apparently be a monopoly, but it is unable to exercise its monopolistic power because it is held within its limits by the courts.

Now, I wish to give you a very short narrative statement of the bills introduced by Congressman Murdock. First, there is a bill creating an interstate trade commission, which is substantially the same as the Clayton bill. I do not know what is the correct way to refer to them—as the Clayton bills or the administration bills.

The CHAIRMAN. They are merely tentative.

Mr. RICHBERG. Very well, I will refer to them as tentative bills. I understand the question to be discussed here is the question of the theory of control rather than of mere mechanism.

The CHAIRMAN. What are the numbers of the other bills?

Mr. RICHBERG. H. R. 9299.

The CHAIRMAN. What are the numbers of the other bills?

Mr. RICHBERG. H. R. 9300 and H. R. 9301. They were introduced at the same time and, as I understand it, the idea by which they were in-

troduced as three bills was in order to separate and distinguish the three subjects for consideration: First, the need for an interstate trade commission; second, the power in the commission to prohibit and prevent by administrative order unfair competition; third, the protection of commerce against monopolies. I think the second bill has been quite thoroughly covered by the questions that were asked of Dean Lewis. The definitions of unfair practices are purposely very broad in order to avoid the difficulties pointed out by Mr. Lewis of attempting to define a crime. When we reach the third bill I would like to break off this discussion just a moment to take up this issue. There are a great many persons who believe that publicity and criticism of unfair practices will terminate the so-called trust problem. But there is a better way. In other words, a monopoly is not built on unfair practices necessarily. There are certain fields wherein monopolies exist which are not necessarily built up on unfair practices and do not necessarily exercise monopolistic power. The question was asked here as to the distinction between a good trust and a bad trust.

I would like to say that I see no good in monopolistic organizations from a public standpoint. But I do see the difference between a large organization which does not possess monopolistic power and a large organization which does possess monopolistic power. The first I regard as an efficient means of business and the other I regard as a menace to the public. When we reach this field of monopoly we find certain so-called natural bases of monopoly; that is, certain bases on which a monopoly naturally will be builded, such as the control of natural resources, the control of terminals, the control of transportation facilities, or any other financial conditions inherent in the industry. In other words, the secret of a monopoly is found in a certain factor which sometimes destroys the possibility of competition.

Now, it is the intention of this third bill that when there is an alleged exercise of monopolistic power the commission shall examine into the facts and determine whether or not the monopoly is based on unfair business competition or on a natural basis of monopoly. The first question is easy, and the answer to that is the elimination of the practices. The second situation raises the problem with which it seems to me no antitrust legislation deals. As long as hands are kept off of the creation of large corporations you must prescribe the acts that shall not be done, prohibit them, and enforce that prohibition in the courts.

Then you must find the appropriate remedy and apply it. In considering the question of the control of monopolistic power, the crux of the question is not found in the smashing of the organization, because if it is an efficient organization it should be permitted to exist, but if it is an unfair and inefficient organization it will dig its own grave. But the interest of the public lies in attacking that force whereby competition is kept out of the field. That may be accomplished in many different ways, each arrived at by a consideration of the peculiar problem in each particular industry. For example, I have in mind the statement made by Mr. Smith that the Standard Oil Co.'s monopoly power is based on its pipe lines. In other words, the control of transportation facilities will be the crux

of the monopoly, and without which no monopoly can exist. It is the intention that this commission shall determine whether a corporation, either through its organization or through its conduct and management of its business, is exercising a power which, in the opinion of the commission, is monopolistic, and if it finds that such monopolistic power exists it shall prescribe the method by which the monopolistic power shall be terminated and shall issue appropriate orders and have power to enforce them. Where the monopolistic power is based on the control of a factor, it will be possible to separate the factor, as, for example, the illustration has been made of the use of the patent right, where a monopoly is based upon the control of the patent by an organization, and the suppression of that factor, namely, the control of the patent right, terminates the monopolistic power of the particular organization.

In the same way, where the control of natural resources is the basis of monopoly, the suppression of that portion of the organization which controls natural resources, throwing it open to all alike, would terminate the monopolistic power of the particular organization without altering the business efficiency of the process of distribution which may have been built up through the control of that resource.

That, in very brief, is the program. I would like to say one word in conclusion in regard to the efforts being made to get away from the thing which has been very strongly urged and emphasized before this committee, and that is the effort to get away from the misleading doctrine of personal guilt. There is no particular pleasure in relieving wrongdoers of the responsibility for their acts, but the history of prosecutions for monopolizing and restraining trade has shown that in the intricacies of corporate organizations it is practically impossible to reach the guilty parties, and the alleged doctrine of personal guilt results in practically making scapegoats of the underlings, if anyone can be attacked at all. The reason for that situation is not difficult to discover. The corporation is built up as a business unit. The law creates a corporation in order that the individuals composing it may act collectively as a unit, and when legislation is permitted to deal adequately with a corporation, it seems to me that we must deal with a corporation as a business unit. Otherwise we are immediately face to face with the difficult problem of untangling the various units forming the collective unit, separating them back into individual units, and then bringing them all together again into the meshes of the prohibitory laws that may affect them.

The effort to go back into the personal responsibility theory is not a progressive effort but a reactionary effort. Step by step the long and arduous fight has been made through the courts. Originally it was resisted in the courts, incorporations were held not to be able to commit a crime, but step by step those theories have been broken down, and you will find in some of the decisions of the courts that they have said that only by laying the liability on the corporations themselves can justice be done.

Mr. CARLIN. Do I understand you to be opposed to the punishment of the men who actually issue the orders?

Mr. RICHBERG. No; I am heartily in favor of it. I am not opposing the removal of the personal-guilt provisions in the Sherman

law, but I am desirous of seeing put on the statute books, in addition to the provisions already contained therein, a provision placing the responsibility for corporate wrongdoing upon the corporation as a business unit, because I think only in that way can preventive and reformative measures be worked out.

Mr. CARLIN. You would not punish the directors?

Mr. RICHBERG. I would punish them if I could reach them; but I say that there should be a provision for reaching the corporation itself, in order that there may be a demand that we have law-abiding corporations as well as law-abiding individuals.

Mr. MORGAN. I see in bill H. R. 9299, introduced by Mr. Murdock, that only corporations doing a gross annual business of $3,000,000 are placed under the jurisdiction of the commission.

Mr. RICHBERG. Yes.

Mr. MORGAN. You think it wise, then, to limit the jurisdiction of the commission to certain characters of corporations?

Mr. RICHBERG. The reason for that limitation, as I understand it, is largely for the benefit of a practicad operation of the law. In other words, if you create a commission of this size and give it unlimited jurisdiction it would be swamped with a multitude of details which would render it unable to perform the functions for which it was created.

Mr. MORGAN. As I understand it, we are entering a new field of exercising Federal jurisdiction over private business; that is, we are placing it under a commission. Now, do you not think it is wise for the Government to go only as far as the public interest demands it and public necessity requires it?

Mr. RICHBERG. Yes, sir.

Mr. MORGAN. In other words, the smaller businesses should not be controlled unless there is some public menace?

Mr. RICHBERG. Yes, sir. On the other hand, there may be a menace in a multitude of small businesses, some of which may be small monopolies.

Mr. MORGAN. I notice in H. R. 9300, introduced by Mr. Murdock, in section 3 you attempt to define unfair competition. Now, under paragraph H it says, "Any other business practices involving unfair or oppressive competition." Now, suppose you strike out all before paragraph H and leave it to the commission to construe the general declaration. In other words, under this bill the commission would decide what would be unfair competition.

Mr. RICHBERG. That would be theoretically, perhaps, more sound than the detailing of any of the practices.

Mr. MORGAN. Pardon me for asking you, but are you an attorney?

Mr. RICHBERG. Yes, sir.

Mr. MORGAN. Referring to section 4 of that bill, what authority is given the commission in regard to making rules and regulations to prohibit certain practices?

Mr. RICHBERG. As I understand it, the theory on which this is drawn, and would be justified, is that the law follows the more modern tendency of stating the broad principles of conduct and leaving the definition of the methods of exercise of power to the commission exactly as it has been left to the Interstate Commerce Commission and justified by the courts.

Mr. MORGAN. I do not think the Interstate Commerce Commission has the authority to make a rule. The bill, of course, declares unjust discrimination unlawful, and then they decide what is unlawful discrimination. But I do not understand that they can, by rule, make a certain specific thing unlawful. They could decide that a certain thing was unlawful because it was unjust?

Mr. RICHBERG. Yes.

Mr. MORGAN. But they could not make it unlawful by a rule?

Mr. RICHBERG. No, sir; I do not think this commission could. I think the intention is that these regulations are simply statements by the commission of its understanding or interpretation of unfair business practices and unfair competition, not that they can add to those which are accepted by the present law.

Mr. MORGAN. Then, if we declare by law unfair competition to be unlawful, that gives the commission the right to decide that a certain thing is unlawful. Could we not give them that power and leave it to the courts to decide whether what was declared unlawful was unlawful?

Mr. RICHBERG. That seems to be the principle of this legislation. Necessarily the courts are in the background of this legislation. The courts are not relieved of a particle of jurisdiction by the creation of this commission. They have jurisdiction under the Constitution. This commission's orders are not enforceable until a court has passed upon them. The commission might order a certain thing done or not to be done, but the order could not be enforced without the process of the court, and necessarily the matter must receive judicial consideration.

Mr. MORGAN. Are not there a good many cases in the States where commissions have been given powers that were formerly regarded as judicial powers and not considered as executive or administrative powers?

Mr. RICHBERG. Well, there is no doubt that that has been the case.

Mr. MORGAN. Are you the secretary of this legislative committee in which Mr. Lewis is interested?

Mr. RICHBERG. Yes, sir.

Mr. MORGAN. The bills that you have read, then, represent the legislative ideas of the Progressive Party?

Mr. RICHBERG. I understand so.

Mr. MORGAN. And Mr. Morgan has introduced a bill on the same subject?

Mr. RICHBERG. Yes.

Mr. MORGAN. Mr. Clayton has also introduced a bill?

Mr. RICHBERG. Yes.

Mr. MORGAN. Do you know the difference between your bill, Mr. Morgan's bill, and Mr. Clayton's bill?

Mr. RICHBERG. As a matter of fact, I read Mr. Morgan's bill with considerable care. I think it was introduced as early as last spring.

Mr. MORGAN. It was introduced two years ago; that is, the first bill.

Mr. RICHBERG. It was called to my attention by one of the Progressive Members here. As a matter of fact, if you will excuse the idea of stealing anyone else's thunder, I did not myself assist in the

incorporation of any of the provisions of Mr. Morgan's bill, but it seems that a good many of the provisions of his bill were drawn upon a sympathetic theory with my bill. Mr. Clayton's bill was very carefully considered also.

Mr. CARLIN. As to the Clayton bill, you have no specific suggestion to make as to how to improve that particular bill, except to take your bill instead of that bill?

Mr. RICHBERG. Well, I have certain very specific suggestions, if you care to hear them. I do not know that you care to go into the mechanism.

Mr. CARLIN. We will be glad to hear what you have to say.

Mr. RICHBERG. I think, for example, that the addition of the right to compel uniform and comparable methods of accounting is necessary to the proper investigations of an interstate trade commission.

Mr. CARLIN. That is Mr. Brandeis's idea.

Mr. RICHBERG. I think he has that idea; but it is not a new idea; it is an old idea. I do not know whether he is the parent of it or not. Another thing is that I believe the commission should have the power to take testimony by deposition and have special examiners, because if the commission is only to act as the commission provided for in the Clayton bill it seems to me that it will be swamped with work without being given additional arms with which to exercise its functions. I have a very definite opinion in that respect. I also think that the definition of a corporation in the second bill is entirely limited. Organizations with which we are dealing sometimes assumes a form known as a corporation, and very often many other forms. There is a form in Massachusetts which is particularly utilized there, and that is trusteeship. There are many other forms of organizations, all of which are practically corporations. I think the term is too limited in the Clayton bill.

Mr. CARLIN. The Clayton bill covers persons, firms, and corporations.

Mr. RICHBERG. Well, if I am in error I would be pleased to be corrected. The bill I have here reads, "That all corporations engaged in interstate commerce." Perhaps this was an earlier proof of the bill.

Mr. CARLIN. Which bill is that?

Mr. RICHBERG. H. R. 12120, page 4.

Mr. CARLIN. I think you will find that bill applies to persons, firms, partnerships, and corporations.

Mr. RICHBERG. I was under the impression that there was no definition of the word corporation in the bill. It seems to me that there should be. Now, I do not want to take up any more of your time unless you wish to ask me any further questions.

Mr. CARLIN. We are much obliged to you.

STATEMENT OF MR. HERBERT KNOX SMITH, LAWYER, HARTFORD, CONN.

Mr. SMITH. Mr. Chairman, I was formerly commissioner of corporations and also assistant commissioner, covering altogether a period of nine years. I shall be extremely brief, Mr. Chairman, as you have been very good to us, indeed. I simply want to discuss the general principle of the Clayton bills, so called. If I understand them correctly, they represent one well-defined, thoroughly

clean-cut line of policy in the regulation of corporations. The Murdock bills represent another line, and the two are totally different. In my personal opinion, the Clayton bills represent the wrong line. If I understand the Clayton bills properly, the essence of them is thoroughly contained in section 4 of the No. 2 committee print, which is, I think, properly referred to as the Clayton bill which defines the Sherman law.

Paragraph 4 sets out the following:

> To make any agreement, enter into any arrangement, or arrive at any understanding by which they, directly or indirectly, undertake to prevent a free and unrestricted competition among themselves or among any purchasers or consumers in the sale, production, or transportation of any product, article, or commodity.

In other words, to enter into any agreement on the part of any party engaged in interstate commerce which will in any way restrain competition between themselves. That goes much further than the present Sherman law. Two parties running stagecoaches across a State line if they were in partnership would violate the terms of that clause. In other words, the theory of the Clayton bill is this: The regulation of corporations by dissolution. It is the theory of the Sherman law carried a little further; the theory that if a corporation or combination has created evil or abuse the way to regulate and prevent the abuse is to take apart the corporation or combination and reduce it to a state of competition. The Murdock bill theory, or the Progressive theory, is the theory, on the contrary, that we must have a large degree of business concentration to carry on the business of the 90,000,000 people; that it must be allowed so far as it is economic, but it must be stopped when it reaches monopolistic power.

Mr. CARLIN. That is to be determined by a commission?

Mr. SMITH. Yes, sir. Personally my opinion is in favor of the latter. But I want to make clear the two very important and very divergent theories that are now before Congress. The theory of the Clayton bills fails, to my mind, in two great points. The first point I have already indicated. It seems to fail to recognize the modern business proposition that you have got to have concentrated power to carry on our business. The theory of the Clayton bills is that every man has got to compete with every other man, and that is going to carry the country back to the days of the blacksmith forge, the grist mill, and the cobbler's bench. The other bills, like the prohibition of holding companies—that bill has not been introduced, but I understand it is contemplated—the prohibition of interlocking directorates and the trade relations bill are along the same line; that is, interlocking directorates are prohibited in order to prevent the getting together of competitors, and the holding company is prohibited in order to prevent the getting together of two competing companies.

Mr. CARLIN. Do you think the commission ought to permit competitors to get together?

Mr. SMITH. My theory of the holding company is like my theory of rocks. A rock is a good thing or an evil thing according to how it is used. So a holding company is a good or an evil thing according to how it is used. It is simply a legal device for getting something together. Now, is that getting together a public benefit or a public detriment, net? It is the net problem. We have to get

together through a business sense in order to carry on the commerce of our 90,000,000 people, and when that getting together gets beyond the point of efficiency and economy and reaches the point of monopolistic control, then the commission says you must stop. The holding company per se is nothing at all. It is simply a means to carry out something. It can be good or evil. The same difficulty is experienced with restriction of competition. Competition may be either good or evil. Now, suppose we carry out the theory of dissolution and throw ourselves back to the time of the forge and the cobbler's bench. Where do you arrive? The trusts to-day are the product of that period. This bill would throw us back into the days of unbridled aggressive competition that was started a hundred years ago. That is the condition which has brought us to where we are to-day. That is the difficulty in my mind with the Clayton theory, that it proposes something that will throw us back into a condition where we will lose efficiency in business, where we will gain nothing because we will have to go through the same process again. Then as to the interlocking-directorate theory and the holding-company theory. They go simply to the legal form.

I was Commissioner of Corporations when they started the suit to dissolve the Standard Oil Co. under the Sherman law. What has happened? They dissolved that company after four years of litigation into 34 companies. The intent of the Sherman law was to restore competition, but if they had wanted to restore competition that is not the way to get at it. You do not get competition by dividing an oil corporation into a pipe line, a tank company, and a business office, because they can not compete. If you had wanted to break the monopolistic power of the Standard Oil Co., a commission expert would have told you that the secret of their power lay in their transportation advantages—earlier it was in railroad rebates and now it is in pipe lines. That is what their control of the market was based upon. To divide a company into its legal relations or component parts is no way to break the strength of its monopoly. As a matter of fact, it has the same strength as it had before. That came about through a process which is absolutely inevitable. That is the trouble with the Clayton theory. It attempts to throw us back to the conditions of industrial impotence and it does it by going at the legal form and not the economic facts. Now, the theory of the progressive bills, or the Murdock bills, is the contrary. It says, practically, "We propose to handle this by administrative process, not through the courts. We propose to take the actual factors of monopolistic power; that is, control of natural resources, control of transportation facilities, railroad rebates, etc., and, going on the expert advice of the commission, to put our finger on the real source of monopolistic power.

Mr. CAREW. What change would you make?

Mr. SMITH. Well, take the Standard Oil Co. If the commission were sitting now or had been sitting at the time the dissolution was proposed, I think I could say that the first order would be to make the pipe lines of the Standard Oil system common carriers. That would have a most sweeping effect upon monopolies, more so than you could get in any other way.

Mr. MORGAN. Are not pipe lines common carriers?

Mr. SMITH. Well, the Interstate Commerce Commission said so six or seven years ago, but it is not enforced.

Mr. CAREW. You think that every monopoly depends upon its own circumstances?

Mr. SMITH. Yes, sir. Every monopoly has usually one name at the keystone of its arch. The steel business has its ore; the American Tobacco Co.'s power has hung largely on the brands they own—Bull Durham, for instance. Mr. Duke told me once that he did not know what the value of the Bull Durham was, but he thought it would be between $20,000,000 and $30,000,000. There is always some one great factor in every monopoly which you can put your finger on if you know what it is.

Mr. MORGAN. Take the International Harvester Co. I remember reading your report on that case.

Mr. SMITH. Well, I went out of office before we finished that report. It was before I had really considered that report. You see, the men under me get together all the facts and digest them, and after a long period of work they come up to me; but in this case they never got up to me, so that I have not clearly in my mind the factor of that monopoly, but a part of it was a very efficient distributing system. That company has some extremely valuable names, like Deering, McCormick, Champion, etc. You have no idea how strong those names are. Take a company like the Harvester company. They go to a retail dealer and say, "Unless you carry our full line you can not get any Champion, Deering, or McCormick machines," and that is an awful club over a man. I do not say that they have done that, but they could do it.

Mr. MORGAN. You remember that they controlled a very large percentage of all the harvester machines manufactured. I think it was 85 per cent.

Mr. SMITH. My impression is that it was less than that.

Mr. MORGAN. That would be a factor, would it not?

Mr. SMITH. Yes; but the question is, How do they get their power?

Mr. MORGAN. Well, they are a combination.

Mr. SMITH. Well, but with the present industry and genius of the people and a great fluid capital, you can not do much with it unless you have something to base it on.

Mr. MORGAN. Do you not think it would be a very great difficulty for anybody to organize a company that would compete with the International Harvester Co.?

Mr. SMITH. There are quite a number of them now, and they are quite successful; that is, some of them.

Mr. MORGAN. Is not that because those independents have followed the lines of the International?

Mr. SMITH. Well, not at the time I knew about them. The International probably molded the theory and some of the smaller companies tried to follow that theory, and some of them made a great deal of money. I know one of them did. But there is competition. If you once give a fair chance for competition, it is surprising how quickly it will come up.

Mr. MORGAN. We had a gentleman talking this morning about the products of petroleum, and he admitted that the Standard fixed the prices and they sold at Standard prices; and, as a matter of fact,

there was no competition at all, and the independent companies were a part of the Standard Co. in their acts.

Mr. SMITH. In the oil business there is only one company that you could call anything like strong, and that is the Pure Oil Co., which is supposed to be allied with the Standard now. The Standard knows all the time that there is potential competition. The Standard can not raise its prices, because the little fellows would lower their prices and undersell them.

Mr. MORGAN. Do you not think that in the course of a year or two the International Harvester Co., if they so desired, could drive every competitor out of business?

Mr. SMITH. I suppose they could if they went into a regular knock down and drag out fight, because they have their own oil supply and their own timber.

Mr. MCGILLICUDDY. Could not the United States Steel Corporation do the same thing, and drive out every competitor in six months, if it wanted to?

Mr. SMITH. My impression is that it could do it if it set its mind to; that is, until the Hill lease expires. It has been canceled, but it has not yet expired. Now, the United States Steel Corporation owns 75 per cent of the available lake ore in the country. I do not have to tell that to a member of the Stanley committee. Any man or corporation who controls 75 per cent of the available lake ore ought to be able to know what is going on in the steel industry.

Mr. VOLSTEAD. Is it not a fact that the United States Steel Corporation practically determines the price of steel?

Mr. SMITH. I do not know whether they do or not. Maybe some of these gentlemen from the Stanley committee can tell you. We really do not know what happened at the Gary dinners. Undoubtedly they did have a strong effect on the determination of the price of steel.

Mr. VOLSTEAD. I think some of the officers of the company admitted that they determined the price of steel. I will ask the gentleman, who was on the Stanley committee, if that is a fact?

Mr. MCGILLICUDDY. I would not want to say.

Mr. SMITH. Well, it may have been in this court investigation.

Mr. MORGAN. Did you ever try to ascertain how many corporations would come under this trade commission if the net annual income was limited to $5,000,000 or $3,000,000?

Mr. SMITH. Well, Senator Newlands drew a bill of that kind and we figured that it would cover somewhere between 550 and 600 corporations. I think $3,000,000 might bring in 1,000 corporations. I am very much in favor of starting something like that, because, in the first place, you will prevent the commission from being swamped with work, and, in the second place, you will get rid of a lot of little kickers in the country. Every little corporation in the country will make a kick and you will have pretty much all the work you can do, and the political annoyance will be pretty heavy.

Mr. MORGAN. I think the statistics in 1909 show that out of all the industrial concerns, 3,060 have an output exceeding $1,000,000.

Mr. SMITH. Well, call it 1,000 on a limitation of $6,000,000.

Mr. MORGAN. How many did you figure would be brought out under the Clayton bill with no limit?

Mr. SMITH. Well, the total number of corporations that paid the 1909 income tax was 288,000. I think it would be probably a safe guess that at least a third of those; well, you can cut out 15,000, because railroads and corporations like that would not come under this bill; but the Clayton bill would probably bring under this commission from 150,000 to 200,000 corporations. I guess 200,000 would be nearer to it.

Mr. MORGAN. The Clayton bill would bring under its supervision many thousand corporations that did not pay the income tax.

Mr. SMITH. Yes, sir.

Mr. MORGAN. In New York, for instance, practically every little corporation does business outside of New York.

Mr. SMITH. Yes, sir; that is the reason I raised that figure to 200,000.

Mr. CARLIN. Under your plan you would only bring in 250 corporations.

Mr. SMITH. Well, between 400 and 1,000. It is only a wild guess, anyway. If I could pick out to-day 500 corporations in this country I would guarantee to get in every one of interest to the public; that is, every corporation that has an effect upon the public.

Mr. MORGAN. Do you think a distinction ought to be made or that it should apply to all persons, all firms, and all corporations? In other words, would it not be better to give this commission jurisdiction only over larger companies?

Mr. SMITH. Well, I looked that up when Senator Newlands was drawing up his bill, and I figured that the number that would come under this commission would be from 500 to 1,000.

Mr. CAREW. Do you not think the Department of Justice as at present constituted ought to be able to deal with them?

Mr. SMITH. No, sir; I do not. The courts have said again and again that it is within the power of Congress to classify and say that legislation shall apply to railroads and not to other things, and to certain kinds of railroads. There is no constitutional wrong or impropriety in making classes as long as the distinction between the classes has a real relation to the corporation. If you classify all corporations at $5,000,000, that may include all corporations big enough to affect the public. You see, classification has a straight connection with regulation. But if you should say that only red-headed men should pay the income tax, of course, it would be unconstitutional, because it is not based on the income tax.

Mr. MORGAN. Or certain corporations in certain sections of the country?

Mr. SMITH. Yes, sir; that would be unconstitutional. I took a great part in trying to regulate corporations in the courts. The Standard Oil case was the finest illustration of how not to do it. The suit for the dissolution of the company was started in 1906. We took over 10,000 pages of testimony. We got the decree in 1910, four years later, and four years in the life of a business is too long a step. Business does not remain the same for four years at a time. The corporation was finally divided up into about 34 companies. They got a decision along legal lines which resulted in a farce, and yet the best possible work was done that could be done. It was the best that we could do with the instruments at hand. The court, the bench and bar,

through the long centuries, have all been worked out for the purpose of settling disputes between two private parties. Now, you can not turn it around and make them determine questions between great corporations and millions of people, questions involving the public welfare.

Mr. CAREW. Now, what would you have your commission do? Assume that the Standard Oil case was before your commission, assuming you had your commission, and you were the head of the commission, what would you do?

Mr. SMITH. Well, the first order I would make would be that the pipe lines should be considered common carriers and publish rates as such. They do not do that now, although the law requires them. Second, I would require that they should cease bribing employees of the railroads to give them information about competitors' shipments. Another thing would be to cease bribing employees of railroads to desert their duty. Another one would be to make them cease from getting railway preferences, if possible.

Mr. CAREW. I believe all those things are crimes.

Mr. SMITH. They are crimes, but it takes the deuce to go and prove them in a court of process.

Mr. CAREW. Do you think it would be easier to prove it before a commission? Do you think a commission is going to believe it quicker?

Mr. SMITH. Well, a commission is not bound hard and fast by the iron system of criminal law.

Mr. CARLIN. Your bill gives the right of appeal to the courts, and it gets back to the courts again.

Mr. SMITH. Pardon me, Mr. Carlin——

Mr. CAREW (interposing). Pardon me, sir. But you would have done that in the Tobacco case?

Mr. SMITH. Well, not the same way.

Mr. CAREW. Well, but something on the same principle.

Mr. SMITH. Yes, sir. The appeal to the court is simply on two grounds, just as the appeal from the Interstate Commerce Commission, first, whether the procedure of the commission is correct, and, second, whether the commission has the legal power to do what it did. The merits of the case can not be reviewed by the courts.

Mr. CAREW. You think in all of these cases it depends upon whether an injury has been done to the public?

Mr. SMITH. Yes, sir.

Mr. CAREW. And, of course, that is really the view taken by the Supreme Court when it put this word "unreasonable" into the statute?

Mr. SMITH. Yes, sir; but you do get such results from administrative action. In 1906 we got the Standard Oil report and we published it in June. We set forth the railroad rebates enjoyed by the Standard Oil Co., and it covered about three-quarters of the area of the United States. Inside of three months every one of the railroads canceled the rates that we had called unfair. Now, we tried the same thing in the courts and drew about a dozen indictments in 1907. We got thrown down in two out of four cases, and I do not think any of the rest of them have been tried yet, and that is eight years ago.

Mr. CAREW. If you subject 500 corporations to administrative action and leave all other corporations to judicial action, then you are not giving those 500 corporations the equal protection of the law.

Mr. SMITH. If the bill contains anything that does not give them the equal protection of the law, the courts will protect them.

Mr. CAREW. If you are going to leave it to the parties involved to carry the questions to the courts, some of them are not going to give you the credence that others would give to the courts——

Mr. SMITH (interposing). Now, that is a very good point.

Mr. CAREW. How are you going to give them the equal protection of the law——

Mr. SMITH (interposing). It would be very obvious that the court would give them the protection they asked for, if they asked for it.

Mr. CAREW. Of course, I am only blundering along; but the ultimate result is that you do get back to the courts?

Mr. SMITH. Yes; if a constitutional right is involved; otherwise the decision of the commission is final.

Mr. MORGAN. Are there not classes of decisions which hold that the statutory provision is that you can not take property without due process of law?

Mr. SMITH. Yes, sir.

Mr. MORGAN. Of course, the administrative commission might take property without due process of law, by reason of settling these controversies. As I understand it, the courts have been inclined in the last quarter of a century to hold that the provision with regard to taking property without due process of law has relation to a controversy between two individuals, but that on these public questions of the relation of a corporation to the public they have no such constitutional right in the courts.

Mr. SMITH. In other words, the courts have applied to the corporations the theory of property affected by the public trust.

Mr. CARLIN. Mr. Smith, you give your commission the power to determine that a corporation is not a bad corporation—to so declare—and give them a legal permit to remain in business?

Mr. SMITH. Not really that, Mr. Carlin, but to determine whether it is engaged in unfair practices, and, if it is, to prohibit those practices.

Mr. CARLIN. But your idea is that there should be no congressional definition of unfair practices?

Mr. SMITH. It is in the bill.

Mr. CAREW. That part that winds up by saying "unfair practices" is pure bunk; when you start out by saying that a thing is unfair, if it is unfair, you know between man and man that is not even respectable.

Mr. SMITH. I do not care to answer that sort of——

Mr. CAREW (interposing). I mean from a reasonable point of view. We are studying this thing hard and giving our best efforts to it, and when you come here with an attempt to assist us like that and say that a thing that is unfair is unfair, that is not assistance. I am almost willing to admit that it is beyond me.

Mr. SMITH. We have stated various forms of unfair practices here, and then we have put in a final form, general unfair practices. We stated that specifically because we felt that the power should be——

Mr. CARLIN (interposing). Mr. Smith, will you read that last definition? That clause, as I understand it, would leave it to the discretion of the commission?

Mr. SMITH. I think you are not quite fair in your statement, Mr. Carew. I may be entirely wrong in my view of the law, but it was worked out fairly without any intention of making buncombe of anything. We endeavored to enable Congress to lay down the general lines of unfair competition. I was not sure whether Congress had the power to lay down the principles of unfair competition, but it seemed to me best to define them as best I could and then put in the other possibility. I was not entirely clear as to what the constitutional rights were.

Mr. CARLIN. The point I was getting at, Mr. Smith, was whether, in the last analysis, if you did what you would have liked to have done you would not have created a commission for giving immunity baths?

Mr. SMITH. Oh, no, Mr. Carlin; we merely created a commission to determine unfair competition and not to give vaccinations.

Mr. CARLIN. Yes; but where they thought the practice was not unfair it amounts to an immunity bath.

Mr. SMITH. Well, no more than when the State's attorney does not prosecute the street railway for being in restraint of trade. That does not give the railroad company an immunity bath.

Mr. CARLIN. But you have a finding of this commission upon the complaint——

Mr. SMITH (interposing). Oh, you mean in the case of the commission?

Mr. CARLIN. Yes. It would amount to an immunity bath.

Mr. SMITH. Oh, no.

Mr. CARLIN. You would say that a certain corporation is guilty of unfair practice——

Mr. SMITH (interposing). You could not plead that in court.

Mr. CARLIN. Oh, but a court would not say that a man who went on and did business with the Government sanction——

Mr. SMITH (interposing). Oh, as far as the past goes, if this commission had investigated and found that a man had been guilty of unfair practices, he ought not to be immune.

Mr. CARLIN. You read the Cummins bill?

Mr. SMITH. I do not know.

Mr. CARLIN. I mean the commission bill introduced by Senator Cummins.

Mr. SMITH. I read so many of them, I do not know.

Mr. CARLIN. That had the immunity expression.

Mr. SMITH. I did not know that.

Mr. MORGAN. It could only refer to such practices as would appear to the commission unfair. I suppose there would have to be some kind of complaint made as to certain practices.

Mr. CARLIN. I want to know whether the effect of this commission, striking out your definitions and adopting your general definition, which you prefer——

Mr. SMITH (interposing). Oh, no; I do not know that I prefer it. I said I did not know at first what the constitutional rights were.

Mr. CARLIN. Now, giving them that power, whether you prefer it or not, supposing you had concluded that it was the best thing to

do, do you not think that is an unwise thing to do for the purpose of determining whether they are good or bad?

Mr. SMITH. You mean good or bad competition?

Mr. CARLIN. Yes.

Mr. SMITH. We have got to determine that. That comes down to the very basis of it. If we can not tell whether competition is bad or good, we have got to either go back to the day of the blacksmith's forge and the cobbler's bench and have no concentration at all, or to have an absolute monopoly.

Mr. CARLIN. You mean unless you can determine what concentration is good or bad? That is the power you would give the commission?

Mr. SMITH. Why, certainly; we have got to. We have got to have some authority to establish it.

Mr. CAREW. The same defect is in paragraph E as in paragraph H, at the bottom of page 196, House bill 9300. It defines oppressive competition, and says oppression is oppression.

Mr. SMITH. The question is what is oppression?

Mr. CAREW. This says that oppression is oppression.

Mr. SMITH. What is the mater with that?

Mr. CAREW. You say, in effect, oppression is hereby defined to be oppression.

Mr. SMITH. Personally I do not see anything wrong with that.

Mr. CAREW. Is that a definition?

Mr. SMITH. It is, as near as you can get at it.

Mr. CAREW. Oppression is oppression?

Mr. SMITH. Oppression is monopoly.

Mr. CAREW. Who is to be the judge of it?

Mr. SMITH. The commission. I could point out a good many cases of that sort. Now, I am very much indebted to you, Mr. Chairman.

Mr. CARLIN. We are much obliged to you.

(Thereupon, the committee adjourned until to-morrow, Thursday, February 12, 1914, at 10.30 o'clock a. m.)